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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

STATE OF CALIFORNIA, ex rel.
LANDS COMMISSION,
Petitioner,

v.

UNITED STATES, et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a state's ability to perfect its title to sovereign lands can be lost through the running of the statute of limitations contained in the federal Quiet Title Act (28 U.S.C. § 2409a(f)) where the United States has failed to communicate explicitly to the state notice of an adverse federal claim.

2. Whether federal courts, in applying the statute of limitations provisions of 28 U.S.C. § 2409a(f), should consider pertinent state law regarding notice of adverse property claims where the federal statute is itself silent or ambiguous.

PARTIES BELOW

Respondents below included the United States Department of the Interior, the Bureau of Land Management, the Department of the Army and the United States Army Corps of Engineers. Respondents John O. Marsh, Jr., Secretary of the Army, Lieutenant General Joseph K. Bratton, Chief of Engineers, Colonel Arthur E. Williams, District Engineer, Donald Hodel, Secretary of the Interior, Robert F. Burford, Director of the Bureau of Land Management and Edward Hasty, California State Director, Bureau of Land Management are the successors in office to six former federal officials who were also named in the complaint. The successor officials automatically replace the originally-named federal respondents under the provisions of Supreme Court rule 40.3.

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OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is reported at 752 F.2d 393 and is reproduced in the Appendix at pages A-1-A-7. The prior decision and judgment of the district court were not published; they are reproduced at App. pp. A-9-A-15.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on January 21, 1985, affirming the order of the United States District Court for the Eastern District of California dated July 22, 1983. The Court of Appeals denied a timely petition for rehearing on May 3, 1985. On July 18, 1985, Mr. Justice Rehnquist signed an order extending the time for filing this petition for certiorari to and including August 31, 1985. This

Court's jurisdiction is invoked under 28 United States Code section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case principally involves the construction of the statute of limitations contained in the federal Quiet Title Act, 28 United States Code section 2409a. Subsection (f) of that statute provides:

> "Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States."

Section 2409a is reproduced in its entirety in the Appendix (App., pp. A-32-A-33). The federal statute creating the California Debris Commission, 33 United States Code section 661 et seq. (the Caminetti Act), and parallel California legislation involved in this case (Cal. Water Code, § 340 et seq. (West's 1984); Cal. Stats. 1893, ch. 228; Cal. Stats. 1897, ch. 113) are also reproduced. (App., pp. A-33-A-49.)

STATEMENT OF THE CASE

A. The Lands And Historical Developments That Precipitated This Dispute

The essential facts relating to this case are undisputed. The property at issue is a 12-mile reach of the Yuba River. Situated in Northern California, the Yuba is a tributary of the Sacramento and Feather Rivers. The Yuba River and its tributaries were the site of extensive gold mining activities in the mid-19th century. Hydraulic mining in particular became a favored means of exploiting the region for gold. This technology used massive volumes of water, sprayed under enormous pressure against mountains and canyons adjoining the rivers, to dislodge gold-bearing materials.

By the 1880's, the disastrous effects of hydraulic mining debris on Northern California waterways and their environs were appar-

ent. Millions of tons of debris were deposited into the Yuba River and vast downstream portions of the Sacramento Valley. The channel of the Yuba River was inundated, causing the flooding of adjacent communities and farmlands. (See, e.g., *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753 (9th Cir. 1884); Kelley, *Gold v. Grain* (Arthur H. Clark Co. (1959).)

B. Federal And State Cooperative Efforts To Harness The Debris Problem

Both the federal government and California had an immediate interest in responding to this catastrophe and protecting downstream areas from further damage. In 1887 and again in 1893, the California Legislature formally requested Congress to take official action that would assist California in ending the debris problem. The congressional response was the Caminetti Act of 1893. (33 U.S.C. § 661 et seq., reproduced at App., pp. A-33-A-44.) That statute created the California Debris Commission, which is in turn staffed by the United States Army Corps of Engineers. The Caminetti Act envisioned a close, ongoing relationship between the State of California and federal officials appointed to the California Debris Commission. The statute, for example, directed the Commission to consult with California officials on planning and construction matters. (33 U.S.C. § 684.) Similarly, the federal statute required the State of California to assume 50 percent of all costs associated with debris control efforts undertaken by the Commission. (33 U.S.C. § 686.)

The California Legislature adopted parallel statutes affirming the state's ongoing participation in the activities of the California Debris Commission. (Cal. Stats. 1893, ch. 228; Cal. Stats. 1897, ch. 113; App., pp. A-44-A-49.) The state legislation created the post of Debris Commissioner and expressly provided for his detailed review and approval of Debris Commission activities. The California statutes authorized the state to assume one-half of the cost of all real property acquisitions incident to federal-state debris control efforts. (*Ibid.*; see also Cal. Water Code, §§ 340-342, reproduced at App., p. A-44.)

The State of California participated actively in the debris control efforts on the Yuba River. This state involvement was

explicitly acknowledged in the official reports of the Debris Commissioner as well as the California Debris Commission (E.R. ("Excerpts of the Record" below) 269-272, 288-293, 295-298).

One of the primary responsibilities of California and the federal government in connection with reclamation of the Yuba River was obtaining the clear title necessary for construction of project works. Private title claims had to be eliminated. The state-appointed Debris Commissioner was active in these efforts, reviewing the deeds obtained by California and the U.S. from private parties and approving all such acquisitions (E.R. 300-302).[1] The cost of these land acquisition efforts was financed equally by California and the federal government.

Deeds for the property rights conveyed by private parties were recorded in the name of the United States. But contemporaneous accounts by both federal and state officials indicate that the form of the deeds was simply a matter of administrative convenience; the private claims were perceived by both entities to be *joint* acquisitions (see, e.g., E.R. 313, 324, 338).

This contemporaneous understanding of federal and state officials is further evidenced by official correspondence of which the lower court took judicial notice. A February 10, 1904 letter from

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[1] It is crucial to note that the deeds at issue were conveyances from private individuals *to* California and the United States. California never conveyed deeds of any kind to the federal government concerning the subject property; nor was it ever requested to do so in connection with the Yuba River flood control effort. Moreover, the nature of claimed private interests were wholly consistent with California's sovereign ownership of the bed of the river. Virtually all private deeds purchased by California and the federal government within the meander lines of the river were mining claims unpatented by the state or federal governments. These private claims were bought out with joint funds to facilitate the reclamation project, often for nominal value as low as one dollar (E.R. 237-238). In sum, none of the deeds referred to in the record and considered by the court below were issued by California to the federal government. Rather, California and the United States were joint recipients of private deeds intended to "clear out" individual claims that in no way contradicted the former's sovereign title interest.

the Secretary of the State Board of Examiners[2] to the California Debris Commissioner specifically addressed the fact that title to jointly-acquired private claims was to be held in the name of the federal government alone. Concerned that such an arrangement might slight California's equal role in the project and violate applicable law, the Secretary wrote:

> "[State of California] Attorney-General Webb and myself have had a talk with [U.S. Army Corps of Engineers representative] Col. Heuer in regard to the proposition of the joint ownership of property bought with the money of the State from the Government and *Col. Heuer admits* that your contention and mine *that when such property reverts it should be the joint property of the State and the Government* is right so there should be no further controversy over that in the future." (App., p. A-28; emphasis added; see generally pp. A-19-A-27.)

Thus, the federal government and California both understood that private property interests acquired in connection with the jointly funded Yuba River project were also jointly owned.

C. Development Of Competing Title Claims Of California And The U.S.

In September 1970, the United States Army Corps of Engineers wrote the State Lands Commission to inquire whether the Yuba River was navigable for title purposes. The Corps of Engineers' letter explained that:

> "This information is necessary in order to determine whether the bed of the river is sovereign lands belonging to the State of California or whether the bed of the river is owned by the riparian owners along the river" (E.R. 230).

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[2] The State Board of Examiners, a predecessor of the current California Department of Finance, was responsible for approving state expenditures in the 19th and early 20th centuries. (See Cal. Stats. 1856, ch. 85; *Vandergrift v. Riley*, 220 Cal. 340, 345-346, 30 P.2d 516, 519 (1936).)

The State Lands Commission responded with a letter asserting that the bed of the river constituted sovereign land owned by the State of California (E.R. 232).

In October 1978, the Corps of Engineers notified counsel for the State Lands Commission that the United States claimed fee ownership of the bed of the Yuba River, a claim adverse to that of the State of California (E.R. 225-228).

D. The District Court Litigation

The State of California, acting by and through the State Lands Commission, brought this action in federal district court to quiet title to the bed of the Yuba River on October 19, 1979. (Named as defendants along with respondent federal agencies and officials were a private mining company and several of its corporate officers who were not parties to the appeal.) The complaint asserted that the Yuba River was a navigable waterway in 1850; that California acquired title to the bed of the river upon admission to the Union as an incident of California's sovereignty; and that the bed of the Yuba River was held in trust by the state for the benefit of its citizens.

Thereafter, the United States moved for summary judgment on the ground that California's action was barred by the 12-year statute of limitations contained in 28 United States Code section 2409a(f). The district court denied the United States' motion and granted California's corresponding request to strike the federal government's statute of limitations defense.

The case proceeded to trial. Midway through that proceeding, however, this Court rendered its opinion in *Block v. North Dakota,* 461 U.S. 273 (1983). That decision held that sovereign state title claims are subject to the statute of limitations contained in section 2409a(f). The district court responded to *Block* by suspending further trial proceedings and, *sua sponte,* ordering reconsideration of its earlier rulings on the statute of limitations issue.

Following renewed argument, the lower court rendered judgment in favor of the United States, finding California's action barred by the statute of limitations. (App., pp. A-10-A-14.)

The district court expressly premised its decision on the cooperative efforts of California and the United States to reclaim the Yuba River at the turn of the century. The court noted that the parties had jointly planned and funded the project, as well as cleared private title claims to facilitate the work. The lower court concluded that such actions imparted actual and constructive knowledge to California of the federal government's claim to the bed of the Yuba River. The court expressly rejected the state's contention that a federal claim to land must be adverse to the state in order to trigger the accrual provisions of section 2409a(f). (*Id.*, at A-11-A-13.)

The district court thus dismissed the case against the United States and certified the statute of limitations issue for appeal. California filed a timely appeal.

E. The Ninth Circuit Opinion

The Ninth Circuit affirmed, adopting the reasoning of the district court. The Court of Appeals rejected California's position that its cause of action could only accrue following clear and unambiguous communication to it of an adverse federal title claim.

The Ninth Circuit found that California had actual notice of the federal government's claim at the turn of the century. The court found dispositive the fact that deeds to jointly-acquired Yuba River property were executed and recorded exclusively in the name of the United States. Despite the contemporaneous historical accounts referred to *supra*, the Court of Appeals ruled that "California was . . . aware that the United States' claim to the land was independent of any claim California may have had." (752 F.2d at 396; App., p. A-6.) The decision found that the recorded deeds constituted a cloud on California's title. The Ninth Circuit also specifically rejected California's position that the statute requires a showing of adversity. (752 F.2d at 397; App., pp. A-6-A-7.)

Finally, the Ninth Circuit declined to consider California's argument that state law should be consulted in resolving accrual and notice issues under section 2409a(f) where the federal statute is itself silent or ambiguous.

REASONS FOR GRANTING REVIEW

The questions presented in this petition are of critical importance in the wake of the Court's recent decision in *Block v. North Dakota, supra,* 461 U.S. 273. *Block* held that section 2409a(f)'s 12-year statute of limitations applies to state sovereign title claims asserted against the federal government.

Significantly, however, this Court did not address in *Block* the central issue upon which future litigation under the statute will largely hinge—how the accrual provisions of section 2409a(f) are to be interpreted and applied.

This case serves as an appropriate vehicle for the Court to address that question, for several reasons. First, the Ninth Circuit's decision conflicts directly with prior opinions of other circuits. Second, the question presented is important and of a recurring nature; judicial economy will be promoted if it is addressed now. There exists a need for uniform application of section 2409a(f)'s accrual standards that only this Court can provide. Finally, adverse consequences to a myriad of federal-state cooperative efforts will result if the Ninth Circuit's decision is allowed to stand.

A. The Decision Below Conflicts With Those Of Several Other Federal Circuits

The Ninth Circuit's interpretation of section 2409a(f)'s accrual provisions conflicts directly and in several respects with the prior decisions of other circuits.

A prominent example is the Ninth Circuit's holding that the statute of limitations can begin to run even in the absence of a federal claim *adverse* to the plaintiff's.[3] The lower court's opinion concludes that "[n]either the language of the statute nor the legislative history of the Act requires a showing of adversity." (752 F.2d 393, 397; App., p. A-6.) This holding is directly contradicted by several other circuits. (See, e.g., *Knapp v. United*

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[3] The particular importance of this principle in title disputes between the federal government and the states is discussed in subsection (C), *infra.*

States, 636 F.2d 279, 283 (10th Cir. 1980); *D.C. Transit System, Inc. v. United States,* 717 F.2d 1438, 1441 (D.C. Cir. 1983); *United States v. Bedford Assoc.,* 657 F.2d 1300, 1316 (2d Cir. 1981), cert. den., 456 U.S. 914 (1982); see also *State of North Dakota v. Block,* Civil No. A78-1092 (D.N.D. Sept. 26, 1984), slip opn., at p. 4 (unreported opn., on remand from U.S. Supreme Court; copy reproduced at App., p. A-50) appeal pending, No. 84-2664 ND (8th Cir.).)

Similarly, the Ninth Circuit rejected the proposition that in order to commence the 12-year statute of limitations period, the federal government must notify third parties of its claim to property in clear and unambiguous terms. (752 F.2d at 397; App., pp. A-67.) This position is again at variance with those of other federal courts. *(Poverty Flats Land & Cattle Co. v. United States,* 706 F.2d 1078, 1079-1080 (10th Cir. 1983); *D.C. Transit System, Inc. v. United States* 717 F.2d 1438, 1441-1443 (D.C. Cir. 1983); see also *Utah v. United States,* No. C 79-0302J (D.C. Utah April 15, 1983), slip opn., at pp. 5-9 (unreported opn.; copy of slip opn. reproduced at E.R. 184), appeal pending, No. 83-1731 (10th Cir.).)

Third, the lower court agreed with earlier precedents that the accrual provisions of section 2409a(f) impart a test of reasonableness, but only insofar as "constructive notice" is concerned. Finding that California had actual notice of the federal claim at the turn of the century, the Ninth Circuit held the "reasonableness" inquiry irrelevant to its disposition of the case. (752 F.2d at 396; App., p. A-5).

This holding conflicts with the Third Circuit's recent decision in *Deakyne v. Dept. of Army Corps of Engineers,* 701 F.2d 271 (3rd Cir. 1983). The question in *Deakyne* was whether the federal government was claiming a fee interest in the subject property or simply an easement. That issue turned largely on the question of whether plaintiff's predecessor in interest reasonably understood the operative effect of a nineteenth century statute in a particular way. The Third Circuit remanded the matter for a determination of whether the private claimant's lack of actual knowledge of the federal claim was reasonable in light of the

language of the statute, status of relevant government maps and surveys, etc. (701 F.2d at 276-277).

Contrary to *Deakyne*, the court below refused to consider whether, under the totality of the circumstances, it was "reasonable" for California to have understood the cooperative state-federal reclamation efforts to manifest a "claim" of the United States for purposes of section 2409a(f).[4] *Deakyne* conflicts with the Ninth Circuit's decision by recognizing—correctly—that the construction given historical facts is an essential part of the reasonableness test inherent in section 2409a(f).

Finally, the Ninth Circuit refused to consider California's position that state property law should be consulted to resolve accrual and notice issues under section 2409a(f) when the statute itself is silent or ambiguous.[5] Other federal circuits have expressly embraced this view. (*Amoco Production Co. v. United States, supra*, 619 F.2d at 1387 ("Local practices and local rules are particularly indicative of whether a party should have known a relevant fact. Moreover, questions involving ownership, transfer and title to real estate have traditionally been resolved according to the laws of the state where the realty is located"); *King v. United States*, 585 F.2d 1213, 1217 (4th Cir. 1978); *United States v. Bedford Assoc.*, 657 F.2d 1300, 1316 (n. 16) (2d Cir. 1981).) The Act's legislative history supports this interpretation. (See Oct. 6, 1981 letter from the Attorney General to the Vice

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[4] Such a conclusion is in fact impossible, given the undisputed historical evidence showing that property rights deeded by individuals to California and the federal government were considered by both to "be the joint property of the State and the Government" and to be so considered "always in the future." (App., p. A-28.) The Ninth Circuit's holding that the federal claim to the subject property was "independent" of California's (752 F.2d 393, 396; App., p. A-6) is thus wholly without evidentiary support and erroneous as a matter of law.

[5] Reference to California law supports petitioner's position on accrual in several contexts. For example, California statutes provide that recordation of deeds under the present circumstances does not impart constructive knowledge to the state. (Cal. Civ. Code, § 1213 (West's 1985); cf. *Amoco Production Co. v. United States*, 619 F.2d 1383, 1387 (10th Cir. 1980).)

President, appended to Sen. Rep. No. 92-575: "The State law of real property would of course apply to decide all questions not covered by federal law"; cf. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 671-676 (1978) (adopting state law as federal rule of decision in case involving state sovereign lands).)

The Ninth Circuit's implicit rejection of these established principles further underscores the intolerable conflict the decision below creates with the established views of numerous other federal circuits. Simply stated, a plaintiff's ability to secure judicial review of his or her title claims should not depend on the federal circuit in which the disputed property is located.

B. The Proper Interpretation Of Section 2409a(f)'s Accrual Provisions Constitutes A Critical Question Of Federal Law. The Court Should Settle This Important Issue

The decision of the Ninth Circuit is likely to have serious adverse consequences that will manifest themselves in the immediate future. The impact of this case, if left unreviewed, is substantial within the Ninth Circuit alone, given the fact that public lands cases predominate in this circuit. Yet the potential nationwide impact of the decision below cannot be underestimated in light of the uncertainty and conflict it injects into what was previously an orderly body of law developed in the other federal circuits.

Even before this Court ruled in *Block v. North Dakota* that the federal statute of limitations applied to state sovereign land claims, the amount of lower court litigation on the accrual issue was significant. (See, e.g., the cases collected in the annotation set forth at 60 A.L.R. Fed. 645 (1982).) The volume of such litigation can be expected to remain substantial in the foreseeable future, given this Court's ruling in *Block* and the often-protracted nature of federal-state land title disputes.[6]

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[6] Recent lawsuits brought by states under the federal Quiet Title Act in which the United States raised the statute of limitations defense include *Nevada v. United States*, 736 F.2d 633 (9th Cir. 1984) (bed of Ruby Lake, Nevada); *Guam v. United States*, 744 F.2d 699 (9th Cir. 1984) (tracts of land on Guam used for military purposes); *State of*

The plain fact is that existing federal case law interpreting and applying the accrual provisions of the federal statute of limitations is in disarray. The decision below is a primary contributor to the confusion that presently exists.

Accordingly, this petition affords the Court an excellent opportunity to correct this problem. The number of cases raising this issue will continue to grow until and unless the Court resolves the present uncertainty through a definitive ruling. Considerations of judicial economy suggest that the Court would be well served to address the accrual issue now.

The need for a uniform federal standard applying section 2409a(f)'s accrual provisions is manifest. Granting the present petition for certiorari will likely remove "the threat to the goal of uniformity of federal procedure posed by the decision below." (*Hanna v. Plumer,* 380 U.S. 460, 463 (1965).) It will also go far toward clarifying the obligations of state and federal governments in asserting and perfecting their respective title claims. (Cf. *United States v. Coleman,* 390 U.S. 599, 601 (1968).)

California ex rel. *State Lands Commission v. United States,* 512 F.Supp. 36 (N.D. Cal. 1981) (San Francisco Bay tidelands); *Utah v. United States,* No. C 79-0302J (D.C. Utah, April 15, 1983), appeal pending No. 83-1731 (10th Cir.) (bed of Utah Lake); and *State of North Dakota v. Block,* Civil No. A 79-1092 (D.N.D. Sept. 26, 1984), reproduced at App., p. A-50, appeal pending, No. 84-2664 ND (8th Cir.) (bed of Little Missouri River).

Other such cases are anticipated in the near future as the several states attempt to resolve new title and statute of limitations disputes with the federal government in the wake of the *Block* decision. The State of Alaska provides a prominent example. Petitioner is informed that Alaska will soon initiate a number of actions to resolve title disputes with the federal government that have been precipitated by massive federal land conveyance and management programs currently underway in that state. (See, e.g., Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3181 et seq.)

C. The Lower Court's Interpretation Of Section 2409a(f)'s Accrual Provisions, If Sustained, Will Serve As A Serious Disincentive For States To Engage In Future Cooperative Endeavors With The Federal Government

The interpretation of section 2409a(f)'s accrual provisions embraced by the court below carries serious adverse policy implications. The Ninth Circuit's opinion creates a major disincentive for states to enter into cooperative planning, financing and development projects with the United States lest that participation result in an inadvertent waiver of their public title claims.

The federal Caminetti Act of 1893 was among the first congressional statutes establishing a close working relationship and cost-sharing principles between the United States and individual states for projects inuring to their mutual benefit. Since that time, Congress has enacted many similar laws designed to promote such cooperative responsibilities between the two levels of government. Many deal with the subject of river and harbor improvements. (See, e.g., 33 U.S.C. § 593.)

One apt illustration relating to California is the Sacramento Flood Control Project, enacted to facilitate flood control measures along the Sacramento River. (39 Stats. 949, 33 U.S.C. § 703.) Under that legislation, the State of California is required to obtain private interests in lands in and adjacent to the Sacramento River *at full cost to the state*. California then must transfer the property to the United States, which is responsible for undertaking the specific reclamation work. (33 U.S.C. § 703(b).)

Under the Ninth Circuit's theory of accrual, such state cooperative efforts could inadvertently trigger section 2409a(f)'s 12-year statute of limitations and forever preclude California's suit against the federal government to perfect its sovereign title interest. This would be true despite the fact that California is obligated to pay 100 percent of the cost of such private acquisitions.

Such congressional enactments are by no means limited to California. Federal statutes and regulations of nationwide application are replete with examples of federal-state cooperative programs that would be threatened if the lower court's ruling is sustained. (See, e.g., 49 Stat. 1571, amended by 50 Stat. 877, 33

U.S.C. § 701c (states required to acquire and provide to U.S. without cost land necessary for federal dams and channel improvements); Reclamation Act of 1902, 41 Stats. 1404, 43 U.S.C. § 395 (governing state and local funding for federally-authorized reclamation projects); Reclamation Project Authorization Act of 1972, Pub.L. 92-514, 86 Stat. 964; Federal Clean Water Act, 91 Stat. 1567, 33 U.S.C. §§ 1256, 1285 (federal water pollution control grant programs); Federal Coastal Zone Management Act, 86 Stat. 1280, 16 U.S.C. § 1454 et seq. (federal grants for state coastal management programs).)

The impact of the decision below on the future viability of such cooperative efforts, which form a cornerstone of federal-state relations in the Western United States, is considerable. Faced with the prospect that such joint activities may later be construed as an inadvertent but nonetheless effective waiver of their right to perfect sovereign title claims, states may in the future be understandably reluctant to participate in such projects. What state could predict that actions similar to California's historic participation in flood control efforts along the Yuba River will release the legal sword of Damocles embodied in section 2409a(f) at some future time?

In summary, the interpretation of section 2409a(f) embraced by the Ninth Circuit serves as a major disincentive for states to participate in cooperative reclamation and similar projects with the federal government. This result is contrary to public policy and the interests of cooperative federalism. The instant petition provides this Court with the opportunity not only to articulate a workable and equitable standard of accrual, but to further the congressional objective of fostering joint state-federal planning programs.

CONCLUSION

Because of the lower court decision's profound impact on established federal law and cooperative federal-state relations, California requests that the Court either summarily reverse, or issue a writ of certiorari to review the important questions presented in this petition.

DATED: August 30, 1985.

Respectfully submitted,

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Attorney General of the
State of California

N. GREGORY TAYLOR,
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(Appendices follow)

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Appendix A

State of California, ex rel.,
State Land Commission,
Plaintiff-Appellant,

v.

Yuba Goldfields, Inc., et al.,
Defendants-Apellees.

No. 83-2401.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted May 15, 1984.
Decided Jan 21, 1985.

Before NORRIS and SCHROEDER, Circuit Judges, and MARSHALL*, District Judge.

CONSUELO BLAND MARSHALL, District Judge:

Appellant, the State of California, appeals from an order of the district court granting summary judgment in favor of the United States. California brought this action in district court in 1979 to quiet title to a portion of the Yuba River. The United States brought a motion for summary judgment, which the district court initially denied. Subsequent to the United States Supreme Court's decision in *Block v. North Dakota ex rel. Board of University and School Lands,* 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983), the district court *sua sponte* reconsidered its order and ruled that the State of California's action was barred by the twelve-year statute of limitations under the Quiet Title Act, 28 U.S.C. § 240a(f). California contends that the district court incorrectly invoked the accrual provisions of the Quiet Title Act. We find no merit in the appellant's challenge and affirm the district court's ruling.

Jurisdiction rests on 28 U.S.C. § 1291.

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* The Honorable Consuelo B. Marshall, United States District Judge for the Central District of California, sitting by designation.

I

The land at issue is a portion of the bed of the Yuba River located in Yuba County, California. Situated in Northern California, the Yuba River is a tributary of the Sacramento and Feather Rivers. During the latter half of the nineteenth century, the Sacramento Valley region was the site of extensive gold mining efforts. In particular, the Yuba River and its surrounding area was severely impacted by the employment of hydraulic mining techniques. Water was sprayed under tremendous pressure along the hillsides above the rivers to dislodge gold-bearing material. As a consequence of hydraulic mining, debris was deposited into the flow of the Yuba River. In time, this had disastrous ramifications for the surrounding environs. Debris inundated the channel of the Yuba River and caused the flooding of the adjacent land. Consequently, the farm utility of the flood stricken property was substantially diminished. In 1893, in response to this catastrophe and with some prodding from the California legislature, Congress enacted the Caminetti Act of 1893, 33 U.S.C. § 661 *et seq.* This legislation established the California Debris Commission, a federal agency staffed by members of the Army Corps of Engineers, which was empowered to regulate and oversee hydraulic mining in the Sacramento and Joaquin river systems within the State of California, 33 U.S.C. § 663. The Caminetti Act had a twofold purpose: (1) to permit hydraulic mining under conditions that would preserve and protect the navigable waters; and (2) to plan works to control the debris and restore the rivers as navigable waterways, 33 U.S.C. §§ 664, 665, 685. In contemplation of federal-state cooperation, the Act authorized the Debris Commission to consult with a state commission of engineers. Specific provisions were included which enabled the Debris Commission to enter into agreements whereby the state would bear one-half of the construction costs for restraining works, 33 U.S.C. § 664, 686. In 1893 and 1897, California passed complementary legislation creating the post of Debris Commissioner. It was the Commissioner's duty to work closely with federal authorities. The legislation expressly authorized him to make payments of California's share of the project, 1893 Cal.Stat., ch. 227; 1897 Cal.Stat., ch. 113.

In 1990, the Debris Commission sumitted the "Vischner Report" to Congress recommending the construction of restraining barriers and a settling basin on the Yuba River to forestall the flow of debris downstream. The project required the acquisition of property within the twelve-mile construction area. Although California contributed one-half of the acquisition costs the subject property was acquired in the name of the United States as the sole grantee. The deeds covering this property were duly recorded with the Yuba County Recorder between 1901 and 1906.

In September of 1970, the Army Corp of Engineers corresponded with the California State Lands Commission inquiring whether California intended to claim title to the properties acquired in connection with the flood control project. In its reply the Commission claimed the property as sovereign land of the State of California. In October 1978, the Corps informed the Deputy Attorney General of California that the United States was the sole fee owner of the riverbed and the adjoining uplands.

On October 19, 1978 California filed suit to quiet title to the twelve-mile stretch of the Yuba River, pursuant to 28 U.S.C. § 2409a, naming several federal and private defendants. Shortly thereafter, the United States moved for summary judgment on the grounds that the action was time-barred by the applicable twelve-year statute of limitations, *see* 28 U.S.C. § 2409a(f). The district court denied the United States' motion and struck its statute of limitations defense.

It was not until the quiet title action had proceeded to trial that the Supreme Court rendered its opinion in *Block v. North Dakota,* 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983), holding that states are not entitled to an exemption from the twelve-year statute of limitations in section 2409a(f). The district court then reconsidered its previous ruling on the statute of limitations issue. After hearing argument on a renewed motion for summary judgment, the court rendered judgment in favor of the United States on the grounds that section 2409a(f) barred the State of California's action. The district court dismissed the case against the United States and certified the statute of limitations issue for appeal. California timely appealed the district court's ruling.

II

THE QUIET TITLE ACT'S STATUTE OF LIMITATIONS

The Quiet Title Act, 28 U.S.C. 2409a *et seq.*, limits the period in which parties may file quiet title actions against the United States to a period of twelve years. Section 2409a(f) provides:

> Any civil action under [the Quiet Title Act] shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff *knew or should have known* of the claim of the United States.

28 U.S.C. § 2409a(f) (emphasis added).

The Quiet Title Act's statute of limitations is strictly construed, *Block, supra,* at 461 U.S. 273, 103 S.Ct. 1811 (1983). This court has strictly followed the *Block* mandate that the twelve-year statute of limitations applies to quiet title suits, such as this, brought by a state against the federal government, *Nevada v. United States,* 731 F.2d 633 (9th Cir.1984).

The central issue on appeal is whether the district court erred in finding that California's cause of action accrued in the early 1900's.[1] The district court granted the United State's motion for summary judgment, finding that:

> [B]ased upon its participation in the California Debris Commission, the State of California had actual knowledge in the early 1900's of the (1) acquisition of the subject property in the name of the United States (2) taking of title to said subject property in the name of the United States, and (3) ultimate claim of the United States to the subject property. Accordingly, the court finds that the State of California 'knew or should have known' of the claim of the United

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[1] Appellate review of a district court's grant of summary judgment is *de novo, M/V American Queen v. San Diego Marine Const.,* 708 F.2d 1483, 1487 (9th Cir.1983). For a movant to be successful in a summary judgment it must be demonstrated that there exists no genuine issue of material fact and that movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

States to the subject property in the early 1900's, within the meaning of § 2409a(f), and that the State of California's cause of action against the United States to quiet title to the subject property accrued in the early 1900's.

California ex rel. State Lands Commission v. United States, No. 79-733 (E.D.Cal, July 20, 1983) [order granting summary judgment]. We concur with the reasoning of the district court and affirm its ruling.

California asserts that the district court applied an incorrect legal standard. Appellant contends that under the Quiet Title Act a cause of action accrues when a state becomes reasonably aware of the United States' claim; that the claim must be truly adverse to the state's claim; and that the United States must communicate its claim to the state in a clear and unambiguous manner. The State of California also asserts that its quiet title action did not accrue until 1978, upon its receipt of an Army Corps of Engineers letter expressing the United States claim to the subject property. We reject these contentions.

Appellant correctly notes that the words "should have known" in section 2409a(f) impart a test of reasonableness, *see Amoco Production v. United States,* 619 F.2d 1383 (10th Cir.1980). Constructive notice of recorded deeds may commence the running of the limitations period, *see Poverty Flats Land and Cattle Co. v. United States,* 706 F.2d 1078, 1079 (10th Cir.1983); *Amoco, supra,* at 1387-88, n. 3 (10th Cir.1983).

In the case at bar, the court need not mull over the issue of whether California "should have known" of the United States' claim, for California had *actual knowledge* of that claim. Although the federal government and California jointly planned and negotiated the acquisition of the property, the deeds to the property were executed and recorded exclusively in the name of the United States. California concedes in its brief that it was aware of this crucial fact. The State of California admits that officials of the California Debris Commission and the State of California worked to acquire lands in the name of the United States. The Debris Commissioner approved all land acquisitions

and was fully aware that the deed to this land was recorded in the name of the United States alone.

It is apparent that California was also aware that the United States' claim to the land was independent of any claim California may have had. In 1912, the California State Engineer noted in his biennial report that the Debris Commission had been authorized to sell the site occupied by the settling basin and that the United States had retained the proceeds of the sale. Hence, by selling the land and retaining the proceeds, the United States exercised dominion over the property. An examination of all of the evidence presented conclusively demonstrates that California had notice of the federal government's interest in the property. This notice was sufficient to start the running of the statute of limitations. *See, e.g., Guam v. United States,* 744 F.2d 699 at 700 (9th Cir.1984);[2] *Nevada v. United States,* 731 F.2d 633, 635 (9th Cir.1984); *Park County v. United States,* 626 F.2d 718, 720-21 (9th Cir.1980). There is no evidence to support California's claim that it did not become aware of the United States' adverse claim until 1978.

The court must strictly construe the Quiet Title Act's statute of limitations. *Block,* 103 S.Ct. at 1820; *Nevada,* at 634. Consequently, we rely on the precise wording of the Act's text to determine when a cause of action accrues. *See also Grosz v. Andrus,* 556 F.2d 972, 975 (9th Cir.1977).

Neither the language of the statute nor the legislative history of the Act requires a showing of adversity. The statute itself does not require that the United States communicate its claim in clear and unambiguous terms; however, several cases suggest that section 2409a(f) is not triggered when the United States' claim is

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[2] At the time of the oral argument in this case, *Guam* was under submission to another panel of this court. That panel presently issued its opinion.

As in this case, the issue in *Guam* was when the limitations period commenced. The court there noted that the crucial issue in determining when the limitations period commences is whether the plaintiff had notice of the United States' claim.

Guam supports the argument advanced by the United States here that the purchase and recording of quitclaim deeds in the United States' name is sufficient to confer notice for the purposes of section 2409a(f).

ambiguous or vague, *see, e.g., Poverty Flats Land & Cattle Co. v. United States,* 706 F.2d 1078 (10th Cir.1983); *Peterson v. Morton,* 465 F.Supp. 986 (C.D.Nev.1979), *vacated on other grounds,* 666 F.2d 361 (9th Cir.1980). In the instant case, the United States' clear interest is evidenced by the existence of quitclaim deeds. It is sufficient that the deeds constituted a cloud on California's title, *see Hatter v. United States,* 402 F.Supp. 1192, 1195 (E.D.Cal.1975).

The court is not persuaded by California's contention that the deeds cannot constitute notice of the federal claim because the property was acquired through the joint efforts of the United States and California. The mere fact that the project was undertaken with California's cooperation does not lead to the conclusion that California was unaware of the federal interest in the property. This court addressed a similar issue in *Humboldt County v. United States,* 684 F.2d 1276 (9th Cir.1982). In *Humboldt* the county entered into a "cooperative agreement" whereby the county agreed to bear eighty percent of the cost of constructing a road across public lands. The United States Bureau of Land Management paid the remaining twenty percent of the construction costs. Under this arrangement, the United States was to retain title to the road. In *Humboldt* we held that the limitations period began to run when the agreement was signed. Thus, the fact that the County and the United States cooperated in constructing the road did not toll the statute of limitations. The same principle applies here.

Here, California concedes that it knew that the property had been acquired in the United States' name and agrees that it was not entitled to special treatment or consideration other than that which would be accorded to claims of private parties. The facts in the case at bar do not compel a departure from the principles enunciated in *Humboldt.*

The district court's finding that the State of California's cause of action accrued in the early 1900's is supported by undisputed facts in the record. As there are no genuine issues of material fact, disposition by summary judgment was appropriate. The district court correctly concluded that appellant's action was time barred under 28 U.S.C. § 2409a(f).

AFFIRMED.

Appendix B

In The United States Court of Appeals
For the Ninth Circuit

No. 84-2401, #S/B 83-2401

D. C. #CIV-S-79-733-RAR
(Eastern District of California)

State of California, ex rel.
State Lands Commission,
Plaintiff-Appellant,

vs.

Yuba Goldfields, Inc.; Martin Kratter; Daniel J. Demers; Frank Andres;
United States of America, Department of The Army; et al.,
Defendants-Apellees.

[Filed May 3, 1985]

Order

Before: SCHROEDER and NORRIS, Circuit Judges, and MARSHALL,* District Judge.

The panel as constituted above has voted to grant appellant's request to take judicial notice and to deny the petition for rehearing.

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* The Honorable Consuelo B. Marshall, United States District Judge for the Central District of California, sitting by designation.

Appendix C

In The United States Court of Appeals
For the Ninth Circuit

No. 83-2401
DC CV S-79-733 RAR

State of California, ex. rel., State Land Commission
Plaintiff-Appellant,

vs.

Yuba Goldfields, Inc., et al.,
Defendants-Appellees.

[Filed May 14, 1985]

JUDGMENT

APPEAL from the United States District Court for the Eastern (Sacramento) District of California (Sacramento).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento).

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Affirmed.

Filed and entered January 21, 1985

APPENDIX D

In The United States District Court
For the Eastern District of California

NO. CIV.S-79-733 RAR

State of California ex rel.
State Lands Commission,
Plaintiff,

v.

Yuba Goldfields, Inc., et al.,
Defendants.

[Filed July 22, 1983]

ORDER

Following the decision of the United States Supreme Court in *Block v. N.D. Ex Rel. Bd. of University & Sch. Lands*, ____ U.S. ____, 103 S.Ct. 1811 (1981) this Court *sua sponte* ordered reconsideration of its order of May 21, 1981 (1) granting the motion of plaintiff State of California ("the State of California") to strike the affirmative defenses of defendants United States of America, U.S. Department of Interior, Bureau of Land Management, Army Corps of Engineers, John O. Marsh, Jr., Lt. Gen. Joseph K. Bratton, Col. Arthur E. Williams, James G. Watt, Robert F. Burford, Edward Hasty (hereinafter referred to collectively as "the United States") and (2) denying the motion of the United States for summary judgment on the grounds that the State of California's action is barred by the statute of limitations provisions of the Federal Quiet Title Act, 28 U.S.C. § 2409(f). The Court ordered the parties to brief the applicability of the *Block* decision and renew their respective motions in light of the *Block* decision. The Court set the matter for hearing before the Court on June 20, 1983.

The hearing on the renewed motions, together with California's related counter-motion for summary judgment on the statute of limitations issue, was held on June 20, 1983. Deputy Attorney

General Richard M. Frank appeared on behalf of the State of California and Assistant U.S. Attorney Mary Beth Uitti appeared on behalf of the United States.

The Court, having heard oral argument and having considered the written papers submitted by the parties, makes the following findings, conclusions, and rulings:

1. The case of *Block v. N.D. Ex. Rel. Bd. of University & School Lands, supra*, is applicable to the captioned action, and the United States may assert the limitations provisions of § 2409a(f) against the State of California in this action to determine ownership of the property at issue in this litigation (the "subject property").

2. A true and correct description of the subject property is set forth in Exhibit A to the Amendment to the Complaint on file in this action. A copy of the description of the subject property is attached hereto as Exhibit A.

3. The United States Congress passed the Caminetti Act on March 1, 1893. (33 U.S.C. §§ 681-687.) The Caminetti Act created the California Debris Commission, a federal agency, for the purposes of regulating hydraulic mining in the State of California and restoring the capacity for navigation of certain Northern California rivers. The Caminetti Act provided, *inter alia*, that the State of California would pay one-half the costs of the California Debris Commission. (33 U.S.C. § 684.)

4. Interests in various portions of the subject property claimed by private parties were acquired between 1901 and 1903 by funds provided one-half by the State of California and one-half by the United States. The State of California and the federal government participated jointly in the planning and negotiating efforts that culminated in the acquisition of these asserted private party interests. These interests in the subject property were obtained in a series of deeds executed in favor of the United States. The deeds to the subject real property were duly recorded in the Yuba County Recorder's Office in the early 1900's.

5. The Court finds that based upon its participation in the California Debris Commission, the State of California had actual

knowledge in the early 1900's of the (1) acquisition of the subject property by the United States, (2) taking of title to said subject property in the name of the United States, and (3) ultimate claim of the United States to the subject property. Accordingly, the Court finds that the State of California "knew or should have known of the claim of the United States" to the subject property in the early 1900's, within the meaning of § 2409a(f), and that the State of California's cause of action against the United States to quiet title to the subject property accrued in the early 1900's.

6. The Court rejects the contention of the State of California that the provisions of § 2409a(f) were triggered in 1978 when officials of the State of California asserted a sovereign claim to the subject property in response to a written inquiry to the State from officers of the United States Army Corps of Engineers, Sacramento Division.

7. The Court further rejects the argument of the State of California that the limitations period of § 2409a(f) does not begin to run until the United States makes a claim that is "truly adverse" to the State and communicated to the plaintiff in an unambiguous fashion. The Court concludes that the interpretation advanced by the State of California is not supported by either the express terms of the Quiet Title Act or the legislative history of the Act. Moreover, the Court finds that if Congress had intended to impose these requirements, it would not have included the phrase "should have known" in § 2409a(f). The Court finds, as a matter of law, that the fact that the State of California and the United States entered into "joint," "cooperative" and mutually advantageous activities in connection with the acquisition of the property and the activities of the California Debris Commission does not prevent the accrual of the limitations period within the meaning of § 2409a(f). *Humboldt County v. United States*, 684 F.2d 1276 (9th Cir. 1982).

8. The Court rejects the argument of the State of California that the Submerged Lands Act (43 U.S.C. § 1311, *et seq.*) is applicable to the present action. Section 1313(a) of the Submerged Lands Act exempts from coverage of the Act "all lands acquired by the United States by purchase . . . in a proprietary

capacity." The Court finds that the subject property was "acquired by the United States by purchase" in the early 1900's for purposes of this section. Accordingly, the Submerged Lands Act is not applicable to this action.

9. Based upon the foregoing, the Court finds that the claim of the State of California against the United States for title to the subject property, which was not brought until 1979, is time-barred under the twelve-year limitation period of § 2409a(f).

10. Because the defense of the statute of limitations is jurisdictional in suits against the United States under Quiet Title Act, 28 U.S.C. § 2409a, this Court does not have subject matter jurisdiction over the instant claim by the State of California to quiet title to the subject real property against the United States. *Block v. North Dakota*, ____ *supra*, ____ U.S. ____, 103 S.Ct. 1820; *Grosz v. Andrus*, 556 F.2d 975 (9th Cir. 1977).

11. Pursuant to the provisions of Rule 54(b) of the Federal Rules of Civil Procedure, the Court finds that the foregoing determinations eliminate the United States as a party to this lawsuit for reasons fully independent of and distinct from the remaining issues and parties in this case. The Court expressly finds that there is no just reason for delaying entry of judgment and directs the entry of a final judgment pursuant to the Certificate of Judgment accompanying this Order.

In accordance with the foregoing findings, conclusions and rulings, and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. The motion of the State of California to strike the affirmative defense of the statute of limitations asserted by the United States, having been duly reconsidered, is hereby denied.

2. The affirmative defense of the statute of limitations provisions of the Federal Quiet Title Act, 28 U.S.C. § 2409a(f), may be asserted by the United States in this action.

3. The State's action to quiet title to the real property that is the subject of this proceeding is time-barred under the provisions of 28 U.S.C. § 2409a(f).

4. The motion of the United States for summary judgment and/or dismissal for lack of subject matter jurisdiction, having been duly reconsidered, is hereby granted.

5. The State of California's counter-motion for partial summary judgement under 28 U.S.C. § 2409a(f), having been duly considered, is hereby denied.

6. The State of California's complaint against the United States is hereby dismissed for lack of subject matter jurisidiction.

7. Judgment shall be entered forthwith in this action in accordance with the terms of this order.

8. A Certificate of Judgment shall be entered pursuant to rule 54(b) of the Federal Rules of Civil Procedure.

9. The federal defendants shall be awarded only those costs incurred in connection with the litigation of the issue of statute of limitations. Each party shall bear all other costs it incurred in this action.

DATED: July 20, 1983.

/s/

Raul A. Ramirez, Judge
United States District Court

[Exhibit A omitted in printing]

Appendix E

In the United States District Court
for the Eastern District of California

No. Civ. S-79-733 RAR

State of California ex rel.
State Lands Commission,
Plaintiff,

v.

Yuba Goldfields, Inc., et al.,
Defendants.

[Filed July 22, 1983]

JUDGMENT

1. Because this Court lacks subject matter jurisdiction over defendants United States of America, U.S. Department of Interior, Bureau of Land Management, Army Corps of Engineers, John O. Marsh, Jr., Lt. Gen. Joseph K. Bratton, Col. Arthur E. Williams, James G. Watt, Robert F. Burford and Edward Hasty under the provisions of 28 U.S.C. § 2409a(f), plaintiff's action against the above-named defendants is therefore dismissed for lack of subject matter jurisdiction.

2. The federal defendants shall be awarded only those costs incurred in connection with the litigation of the issue of statute of limitations. Each party shall bear all other costs it incurred in this action.

Entered this day of July, 1983

Clerk of the Court

Approved:

/s/
Raul A. Ramirez, Judge
United States District Court

DATED: July 20, 1983.

Appendix F

In the United States District Court
for the Eastern District of California
No. Civ. S-79-733 RAR

State of California ex rel.
State Lands Commission,
Plaintiff,

vs.

Yuba Goldfields, Inc., et al.,
Defendants.

[Filed July 22, 1983]

CERTIFICATE OF JUDGMENT
F.R.Civ.P. 54(b)

Following the decision of the United States Supreme Court in *Block v. N.D. ex rel. Bd. of University & Sch. Lands*, ____ U.S. ____, 103 S.Ct. 181 (1983), this Court *sua sponte* ordered reconsideration of its order of May 21, 1981, (1) granting the motion of plaintiff State of California ("the State of California") to strike the affirmative defenses of defendants United States of America, U.S. Department of Interior, Bureau of Land Management, Army Corps of Engineers, John O. Marsh, Jr., Lt. Gen. Joseph K. Bratton, Col. Arthur E. Williams, James G. Watt, Robert F. Burford and Edward Hasty (hereinafter referred to collectively as "the United States") and (2) denying the motion of the United States for summary judgment on the grounds that the State of California's action was barred by the statute of limitations provisions of the Federal Quiet Title Act, 28 U.S.C. § 2409a(f). After hearing oral argument and considering the written papers submitted by the parties regarding the statute of limitations issue, the Court has determined that the State of California's action against the United States is time-barred by the limitations period of § 2409a(f) and that the State of California's action should be dismissed as to the United States on the grounds of lack of subject matter jurisdiction.

The foregoing ruling eliminates the United States as a party in the captioned action for reasons fully independent of and distinct

from the remaining issues and parties in the case. There is, therefore, no likelihood that resolution of the statute of limitations issue in favor of the United States will be rendered moot by any further action of this Court, or that there will be a danger of multiple appeals on the same or similar issues upon issuance of this Certificate.

Accordingly, the Court, expressly finding that there is no just reason for delaying entry of judgment as to its rulings with respect to the United States, orders that judgment be entered as follows.

IT IS THEREFORE ORDERED AND ADJUDGED:

That plaintiff State of California take nothing based on its complaint against defendant United States of America;

That plaintiff State of California's action be dismissed as to defendant United States of America on the grounds of lack of subject matter jurisdiction; and

That the defendant United States of America recover from plaintiff State of California any and all costs incurred in connection with the litigation of the issue of statute of limitations, each party to bear all of their costs incurred in this action.

DATED: July 20, 1983.

/s/

Raul A. Ramirez, Judge
United States District Court

Appendix G

United States Court of Appeals
For The Ninth Circuit

Civil No. 83-2401

State of California, ex rel.,
State Lands Commission,
Plaintiff-Appellant,

v.

United States, et al.,
Defendants-Appellees.

On Appeal From The United States District Court For The
Eastern District of California
No. Civ-S-79-733-RAR

Appellant's Petition For Rehearing
And
Request to take Judicial Notice

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For The Ninth Circuit

Civil No. 83-2401

State of California, ex rel.,
State Lands Commission,
Plaintiff-Appellant,

v.

United States, et al.,
Defendants-Appellees.

On Appeal From The United States District Court For The
Eastern District of California
No. Civ-S-79-733-RAR

Apellant's Petition For Rehearing

INTRODUCTION

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, appellant State of California ex rel. State Lands Commission (hereinafter "California" or "appellant") respectfully petitions the Court for rehearing in the above-entitled action.[1] The petition is based on the fact that a material fact of central importance to the Court's resolution of this case was previously unavailable and therefore overlooked in the decision.

Counsel for appellant hereby certifies that, in his judgment, the facts set forth herein are material to the issues on appeal, and appear to have been overlooked by the Court.

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[1] The Court's decision in this case was filed, and judgment entered, on January 21, 1985. This Petition for Rehearing is therefore timely. (Federal Rules of Appellate Procedure, Rule 40.)

I

OFFICIAL, CONTEMPORANEOUS CORRESPONDENCE DEMONSTRATES THAT BOTH FEDERAL AND STATE OFFICIALS AGREED THAT PROPERTY ACQUIRED TO CONTROL FLOODING AND DEBRIS PROBLEMS ALONG THE YUBA RIVER AT THE TURN OF THE CENTURY WAS TO BE HELD *JOINTLY* BY THE TWO LEVELS OF GOVERNMENT

The central issue in the present case is when California knew or should have known of the title claim of the United States to the bed of the Yuba River. The district court held, and this Court affirmed, that California knew of the federal claim to the property at issue at the turn of the century, and that appellant's quiet title action against the United States was therefore barred under the 12-year statute of limitations contained in the federal Quiet Title Act. (28 U.S.C. § 2409a(f).)

In its January 21, 1985 opinion, this Court placed central importance on the fact that although California and the U.S. jointly planned and funded necessary property acquisitions, the deeds were executed and recorded in the name of the U.S. alone. (Slip op. at 7.) The Court also concluded that the federal claim to the subject property "was independent of any claim California may have had." (*Ibid.*)

Recently-discovered official documents directly contradict this assumption. True and correct copies of those documents are set forth as exhibit "A" to this Petition. Their contents may be summarized as follows: On January 12, 1904 Secretary of the California State Board of Examiners, W. S. Melick wrote a letter to California Debris Commissioner W. W. Waggoner.[2] In that letter, Mr. Melick informed the Debris Commissioner that a

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[2] The State Board of Examiners, the predecessor of the current California Department of Finance, was responsible for approving state expenditures in the 19th and early 20th centuries. (See, e.g., *Vandergrift v. Riley* (1936) 220 Cal. 340, 345-346, 30 P.2d 516, 519.) The office of the California Debris Commissioner, on the other hand, was created by the California Legislature in 1893 to work together with its federal counterpart, the California Debris Commission, on debris control

contract relating to work on the Yuba River had been approved by the Board of Examiners, but noted with concern a reversionary clause that would put title to property in the name of the federal government alone. Noting that this would appear to contravene the joint funding arrangement established under applicable law, he inquired, "[O]ught not the property become a joint possession?"

Mr. Melick wrote a second letter to Debris Commissioner Waggoner on this subject on February 10, 1904. That letter contains the following critical passage:

> "Since receiving your letter, [State of California] Attorney-General Webb and myself have had a talk with Col. Heuer in regard to the proposition of the joint ownership of property bought with the money of the State from the Government, and *Col. Heuer admits* that your contention and mine *that when such property reverts it should be the joint property of the State and the Government* is right so there should be no further controversy over that in the future." (Emphasis added.)

The Col. Heuer referred to in this letter is W. H. Heuer, who was an employee of the U.S. Army Corps of Engineers and a member of the California Debris Commission. (See, U.S. Army Corps of Engineers, *The California Debris Commission: A History* (Corps of Engineers 1981) at 28,31.)

Lest this language be considered an aberration from the normal state-federal understanding concerning ownership of acquired property along the Yuba, the February 10th letter contains the following additional passage: "The resolution was changed, as you will notice to provide for this and Col. Heuer said that *the resolution always in the future should recognize that as joint property.*" (See exhibit "A" hereto; emphasis added.)

The significance of this correspondence, of course, is that it explicitly confirms appellant's position on this crucial issue: irrespective of the language of the deeds involved, California and the

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projects including the Yuba River. (See appellant's opening brief at 11-14.)

federal government always understood and agreed that property acquired in connection with the jointly-funded Yuba River project *was also jointly-owned.* It is therefore patently unfair to construe those acquisitions as triggering the 12-year statute of limitations contained in 28 U.S.C. section 2409a9f).[3] Inasmuch as this Court's opinion interprets the federal government's claim to the subject property in a manner directly contravened by these documents, that decision should be reconsidered.

Finally, these documents are properly the subject of judicial notice. (See attached Request to Take Judicial Notice and authorities cited therein.) The Court may therefore consider them in conjunction with this Petition for Rehearing.

II

THESE DOCUMENTS WERE ONLY RECENTLY DISCOVERED, WHILE THE INSTANT APPEAL WAS PENDING, DESPITE DUE DILIGENCE ON THE PART OF APPELLANT

While judicial notice of the attached documents is therefore proper at the present time, the Court deserves an explanation as to why their existence is only now being made known.

Representatives of appellant have undertaken historical research on navigability and related issues concerning the Yuba River since at least 1978. Relevant material has been culled from a multitude of sources located in numerous repositories.

Unfortunately, the historical materials set forth in exhibit "A" were only discovered while the present appeal was pending, and long after briefing in the case had closed. (This can be attributed to the fact that their source, the official records of the State Board of Examiners, plays a rather arcane role in the historical events which culminated in this litigation.)

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[3] While California will not reargue the point here, these newly-discovered documents are fully consistent with the position set forth in its earlier briefs. (See, e.g., appellant's opening brief at 8-15, 32-35; reply brief at 6-15; and references to the Excerpts of the Record cited therein.)

California and its counsel therefore certify that the discovery of these materials occurred only recently despite the best efforts of appellant and its historical consultants, and as part of a diligent, continuing inquiry into the pertinent facts of this case.

III

THESE NEWLY-DISCOVERED FACTS FULLY WARRANT REHEARING IN THE PRESENT CASE

These newly-discovered official documents tell a story entirely different from that embraced by the Court in its January 21, 1985 opinion. They confirm that the federal government's claim to the subject property was *not* independent of that posited by California. Rather, ownership was joint in nature, as recognized by contemporaneous declarations of relevant federal and state officials.

Similarly, California simply could not have known, based on this cooperative flood control effort nearly a century ago, of a federal "claim" to the property within the meaning of section 2409a(f). The land was instead viewed as "the joint property of the State and the Government." To construe the applicable statute of limitations to have been triggered under such circumstances strains both logic and accepted legal principles.

CONCLUSION

Secretary Melick's prediction that because of the understanding reached in early 1904 "there should be no further controversy over [the state-federal ownership issue] in the future" has, unhappily, been proven incorrect by subsequent events. But the essential facts referred to in his official correspondence go to the heart of this case. Since the Court's recent decision is at variance with those facts, it should be reconsidered.

Dated: February 4, 1985

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General of the State of California

N. GREGORY TAYLOR
Assistant Attorney General

By _____
RICHARD M. FRANK
Deputy Attorney General
Attorneys for Appellant State of California ex rel. State Lands Commission

State of California
Office of the Secretary of State

I, MARCH FONG EU, Secretary of State of the State of California, hereby certify:

That the annexed transcript was prepared by and in this office from the RECORD on file, of which it purports to be a copy, and that it is full, true and correct.

IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this May 14, 1984.

[Seal]

March Fong Eu

Secretary of State

DECLARATION OF LAREN W. METZER

I, Laren W. Metzer, declare:

1. I am an archivist employed by the California State Archives, Sacramento, California.

2. The attached correspondence has been reproduced from the 1903-1905 volume of official correspondence of the Board of Examiners of the State of California, which volume is now in the possession of the California State Archives.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Sacramento, California on February 4, 1985.

/s/
LAREN W. METZER

January 18, 4

Mr. W. W. Waggoner,
Debris Commissioner,
96 Flood Bldg., San Francisco.

My dear Sir:—

Enclosed please find contract with Samuel Montgomery, as requested, approved by the Board of Examiners. We note that the contract says in Section B: "Thereupon become the property of the United States." Inasmuch as such contracts are rescinded and when the property acquired under the compromise was paid for by the State and the Government together ought not the property become a joint possession?

We have approved the claim, notwithstanding this objection and pass it on to your judgment to act in the matter. The resolution and contract are returned to you and if our objection is valid the contract can be returned for correction.

The extra copies for the National Commission are also enclosed.

Yours very respectfully,

Secretary State Board of
Examiners.

February 10, 4

Mr. W. W. Waggoner, Debris Commissioner,
Nevada City, Cal.

Dear Sir:—

Your letters of February 5th have had the attention of the State Board of Examiners. Since receiving your letter, Attorney-General Webb and myself have had a talk with Col. Heuer in regard to the proposition of the joint ownership of property bought with the money of the State from the Government, and Col. Heuer admits that your contention and mine that when such property reverts it should be the joint property of the State and the Government is right so there should be no further controversy over that in the future.

The resolution was changed, as you will notice to provide for this and Col. Heuer said that the resolution always in the future should recognize that as joint property.

The Board also thanks you for the information received in regard to the progress of the work upon Barrier No. 1 and at Daguerre Point.

Yours very respectfully,

W. S. Melick
Secretary State Board of
Examiners.

United States Court of Appeals

For the Ninth Circuit

Civil No. 83-2401

State of California, ex rel.
State Lands Commission,
Plaintiff-Appellant,

v.

United States, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
NO. CIV-S-79-733-RAR

APPELLANT'S REQUEST TO TAKE JUDICIAL NOTICE

Appellant State of California ex rel. State Lands Commission respectfully requests the Court to take judicial notice of the material set forth as exhibit "A" to appellant's Petition for Rehearing in the above-entitled action.

These materials consist of two letters, dated January 12 and February 10, 1904, from Secretary of the California State Board of Examiners W. S. Melick to W. W. Waggoner, California Debris Commissioner. These letters were obtained from the official correspondence files of the State Board of Examiners, presently housed in the California State Archives in Sacramento, California. The letters set forth the understanding of California and the federal government regarding title to jointly-purchased property along the Yuba River at the turn of the century—matters directly at issue in the present appeal. (See attached Petition for Rehearing.)

This type of official government correspondence is properly the subject of judicial notice. In *United States v. Camp* (9th Cir. 1984) 723 F.2d 741, 744, for example, this Court recently took

judicial notice of an administrative order issued by the U.S. Attorney General. In a lengthy footnote explaining its action, the Court summarized numerous instances in which federal courts have previously taken judicial notice of orders, regulations, bulletins, *letters* and policies issued by the executive branch of government. (*Ibid.*)

Numerous other cases are in accord. (See, e.g., *Massachusetts v. Westcott* (1977) 445 U.S. 322, 323 (contents of U.S. Coast Guard files); *Illinois Central Railroad Co. v. Tennessee Valley Authority* (6th Cir. 1971) 445 F.2d 309, 310 (N.4) (T.V.A. Report to Congress).) The Court of Claims' recent decision in *American Indians Residing on Maricopa-AK Chin Reservation v. United States* (Ct.Cl. 1981) 667 F.2d 980 is particularly apposite. There the court took judicial notice of federal right-of-way maps obtained from the National Archives. It expressly held that these materials

> "qualify as adjudicative facts entitled to judicial notice under section 201(b)(2) of the Federal Rules of Evidence. A judicially noticed fact is one 'not subject to reasonable dispute' when it is 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' " (667 F.2d at 999.)[1]

Of course, materials that are properly the subject of judicial notice may be offered to and considered by the courts at any stage of the litigation process, including on appeal. (*United States v. Camp, supra*, 723 F.2d 741, 744 (fn.); see also, Federal Rules of Evidence, Rule 201(f).)

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[1] Even if they did not fall within the doctrine of judicial notice, the contents of these letters would be admissible under numerous exceptions to the hearsay rule, including the public records, ancient document and "interests in property" exceptions. (Federal Rules of Evidence, Rule 803(5), (6), (8), (14), (15), (16) and (24).) The statement of federal official Col. Heuer referred to in the February 10, 1904 letter is further admissible as an admission of a party-opponent. (Federal Rules of Evidence, Rule 801(d)(2).)

Accordingly, appellant State of California respectfully requests that the Court take judicial notice of the materials contained as exhibit "A" to appellant's Petition for Rehearing, filed concurrently herewith.

Dated: February 4, 1985

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the
State of California
N. GREGORY TAYLOR
Assistant Attorney General

By_____
RICHARD M. FRANK
Deputy Attorney General

Attorneys for Appellant State of California ex rel. State Lands Commission

Appendix H

28 U.S.C.A. § 2409a

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(d) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(e) A civil action against the United States under this section shall be tried by the court without a jury.

(f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(g) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

§ 661. Creation of commission; appointment of members; vacancies; powers generally

A commission is created, to be known as the California Debris Commission, consisting of three members. The President of the United States shall, by and with the advice and consent of the Senate, appoint the commission from officers of the Corps of Engineers, United States Army. Vacancies occurring therein shall be filled in like manner. It shall have the authority, and exercise the powers set forth in sections 662 to 685 of this title, under the supervision of the Chief of Engineers and direction of the Secretary of the Army.

§ 662. Organization; compensation of members; rules and regulations of procedure; traveling expenses

Said commission shall organize by the selection of such officers as may be required in the performance of its duties, the same to be selected from the members thereof. The members of said commission shall receive no greater compensation than is now allowed by law to each, respectively, as an officer of said Corps of Engineers. It shall also adopt rules and regulations, not inconsistent with law, to govern its deliberations and prescribe the method of procedure under the provisions of sections 661 to 685 of this title. While traveling on duty the officers of the commission shall receive the mileage allowed by law.

§ 663. Territorial jurisdiction over hydraulic mining; hydraulic mining injurious to navigation prohibited

The jurisdiction of said commission, in so far as the same affects mining carried on by the hydraulic process, shall extend to all such mining in the territory drained by the Sacramento and San Joaquin River systems in the State of California. Hydraulic

mining, as defined in section 668 of this title, directly or indirectly injuring the navigability of said river systems, carried on in said territory other than as permitted under the provisions of sections 661 to 685 of this title is prohibited and declared unlawful.

§ 664. General duties as to plans for protection of navigation

It shall be the duty of said commission to mature and adopt such plan or plans, from examinations and surveys made prior to March 1, 1893, and from such additional examinations and surveys as it may deem necessary, as will improve the navigability of all the rivers comprising asid systems, deepen their channels, and protect their banks. Such plan or plans shall be matured with a view of making the same effective as against the encroachment of and damage from debris resulting from mining operations, natural erosion, or other causes, with a view of restoring, as near as practicable and the necessities of commerce and navigation demand, the navigability of said rivers to the condition existing in 1860, and permitting mining by the hydraulic process, as the term is understood in said State, to be carried on, provided the same can be accomplished, without injury to the navigability of said rivers or the lands adjacent thereto.

§ 665. Survey for débris reservoirs; study of methods of mines and mining

It shall further examine, survey, and determine the utility and practicability, for the purposes hereinafter indicated, of storage sites in the tributaries of said rivers and in the respective branches of said tributaries, or in the plains, basins, sloughs, and tule and swamp lands adjacent to or along the course of said rivers, for the storage of débris or water or as settling reservoirs, with the object of using the same by either or all of these methods to aid in the improvement and protection of said navigable rivers by preventing deposits therein of débris resulting from mining operations, natural erosion, or other causes, or for affording relief thereto in flood time and providing sufficient water to maintain scouring force therein in the summer season; and in connection therewith to investigate such hydraulic and other mines as are or may have been worked by methods intended to restrain the débris and material moved in operating such mines by impounding dams,

settling reservoirs, or otherwise, and in general to make such study of and researches in the hydraulic mining industry as science, experience, and engineering skill may suggest as practicable and useful in devising a method or methods whereby such mining may be carried on as aforesaid.

§ 666. Noting conditions of navigable channels

The said commission shall from time to time note the conditions of the navigable channels of said river systems, by cross-section surveys or otherwise, in order to ascertain the effect therein of such hydraulic mining operations as may be permitted by its orders and such as is caused by erosion, natural or otherwise.

§ 667. Annual reports

Said commission shall submit to the Chief of Engineers, for the information of the Secretary of the Army, on or before the 15th day of November of each year, a report of its labors and transactions, with plans for the construction, completion, and preservation of the public works outlined in sections 661 to 685 of this title, together with estimates of the cost thereof, stating what amounts can be profitably expended thereon each year. The Secretary of the Army shall thereupon submit same to Congress on or before the meeting thereof.

§ 668. "Hydraulic mining" and "mining by hydraulic process" defined

For the purposes of sections 661 to 685 of this title "hydraulic mining" and "mining by the hydraulic process" are declared to have the meaning and application given to said terms in the State of California.

§ 669. Petition by hydraulic miners

The individual proprietor or proprietors, or in case of a corporation, its manager or agent appointed for that purpose, owning mining ground in the territory in the State of California mentioned in section 663 of this title, which it is desired to work by the hydraulic process, must file with said commission a verified petition, setting forth such facts as will comply with law and the rules prescribed by said commission.

§ 670. Surrender to United States of right to regulate débris of mine

Said petition shall be accompanied by an instrument duly executed and acknowledged, as required by the law of the said State, whereby the owner or owners of such mine or mines surrender to the United States the right and privilege to regulate by law, as provided in sections 661 to 685 of this title, or any law that may be enacted after March 1, 1893, or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the débris resulting from the working of said mine or mines shall be restrained, and what amount shall be produced therefrom; it being understood that the surrender aforesaid shall not be construed as in any way affecting the right of such owner or owners to operate said mine or mines by any other process or method in use in said State on March 1, 1893: *Provided,* That they shall not interfere with the navigability of the aforesaid rivers.

§ 671. Petition for common dumping ground, etc.

The owners of several mining claims situated so as to require a common dumping ground or dam or other restraining works for the debris issuing therefrom in one or more sites may file a joint petition setting forth such facts in addition to the requirements of section 669 of this title; and where the owner of a hydraulic mine or owners of several such mines have and use common dumping sites for impounding debris or as settling reservoirs, which sites are located below the mine of an applicant not entitled to use same, such fact shall also be stated in said petition. Thereupon the same proceedings shall be had as provided for in sections 661 to 685 of this title.

§ 672. Notice of petition for dumping grounds, etc.; hearing

A notice specifying briefly the contents of said petition and fixing a time previous to which all proofs are to be submitted shall be published by said commission in some newspaper or newspapers of general circulation in the communities interested in the matter set forth therein. If published in a daily paper such publication shall continue for at least ten days; if in a weekly paper in at least three issues of the same. Pending publication

thereof said commission, or a committee thereof, shall examine the mine and premises described in such petition. On or before the time so fixed all parties interested, either as petitioners or contestants, whether miners or agriculturists may file affidavits, plans, and maps in support of their respective claims. Further hearings, upon notice to all parties of record, may be granted by the commission when necessary.

§ 673. Order by commission directing method of mining, etc.; expenses of complying with order; exemption from mining taxes

In case a majority of the members of said commission, within thirty days after the time so fixed, concur in the decision in favor of the petitioner or petitioners, the said commission shall thereupon make an order directing the methods and specifying in detail the manner in which operations shall proceed in such mine or mines; what restraining or impounding works, if any, if facilities therefor can be found, shall be built and maintained; how and of what material; where to be located; and in general set forth such further requirements and safeguards as will protect the public interests and prevent injury to the said navigable rivers and the lands adjacent thereto, with such further conditions and limitations as will observe all the provisions of sections 661 to 685 of this title in relation to the working thereof and the payment of taxes on the gross proceeds of the same: *Provided,* That all expense incurred in complying with said order shall be borne by the owner or owners of such mine or mines: *And provided further,* That where it shall appear to said commission that hydraulic mining may be carried on without injury to the navigation of said navigable rivers and the lands adjacent thereto, an order may be made authorizing such mining to be carried on without requiring the construction of any restraining or impounding works or any settling reservoirs: *And provided also,* That where such an order is made a license to mine, no taxes provided for in sections 661 to 685 of this title on the gross proceeds of such mining operations shall be collected.

§ 674. Plans for and supervision of work required by order; permit to commence mining

Such petitioner or petitioners must within a reasonable time present plans and specifications of all works required to be built in pursuance of said order for examination, correction, and approval by said commission; and thereupon work may immediately commence thereon under the supervision of said commission or representative thereof attached thereto from said Corps of Engineers, who shall inspect same from time to time. Upon completion thereof, if found in every respect to meet the requirements of the said order and said approved plans and specifications, permission shall thereupon be granted to the owner or owners of such mine or mines to commence mining operations, subject to the conditions of said order and the provisions of sections 661 to 685 of this title.

§ 675. Conditions precedent for commencement of mining operations

No permission granted to a mine owner or owners under sections 661 to 685 of this title shall take effect, so far as regards the working of a mine, until all impounding dams or other restraining works, if any are prescribed by the order granting such permission, have been completed and until the impounding dams or other restraining works or settling reservoirs provided by said commission have reached such a stage as, in the opinion of said commission, it is safe to use the same: *Provided, however,* That if said commission shall be of the opinion that the restraining and other works already constructed at the mine or mines shall be sufficient to protect the navigable rivers of said systems and the work of said commission, then the owner or owners of such mine or mines may be permitted to commence operations.

§ 676. Allotment of expenses for common dumping grounds; location of impounding works

In case the joint petition referred to in section 671 of this title is granted, the commission shall fix the respective amounts to be paid by each owner of such mines toward providing and building necessary impounding dams or other restraining works. In the event of a petition being filed after the entry of such order, or in

case the impounding dam or dams or other restraining works have already been constructed and accepted by said commission, the commission shall fix such amount as may be reasonable for the privilege of dumping therein, which amount shall be divided between the original owners of such impounding dams or other restraining works in proportion to the amount respectively paid by each party owning same. The expense of maintaining and protecting such joint dam or works shall be divided among mine owners using the same in such proportion as the commission shall determine. In all cases where it is practicable, restraining and impounding works are to be provided, constructed, and maintained by mine owners near or below the mine or mines before reaching the main tributaries of said navigable waters.

§ 677. Limitation as to quantity of debris washed away

At no time shall any more debris be permitted to be washed away from any hydraulic mine or mines situated on the tributaries of said rivers and the respective branches of each, worked under the provisions of sections 661 to 685 of this title, than can be impounded within the restraining works erected.

§ 678. Modification and revocation of permit to mine

The said commission may, at any time when the condition of the navigable rivers or when the capacities of all impounding and settling facilities erected by mine owners or such as may be provided by Government authority require same, modify the order granting the privilege to mine by the hydraulic mining process so as to reduce the amount thereof to meet the capacities of the facilities then in use; or, if actually required in order to protect the navigable rivers from damage or in case of failure to pay the tax prescribed by section 683 of this title within thirty days after same becomes due, may revoke same until the further notice of the commission.

§ 679. Violation of permit to mine; penalty

An intentional violation on the part of a mine owner or owners, company, or corporation, or the agents or employees of either, of the conditions of the order granted pursuant to section 673 of this title, or such modifications thereof as may have been made by

said commission, shall work a forfeiture of the privileges thereby conferred, and upon notice being served by the order of said commission upon such owner or owners, company, or corporation, or agent in charge, work shall immediately cease. Said commission shall take necessary steps to enforce its orders in case of the failure, neglect, or refusal of such owner or owners, company, or corporation, or agents thereof, to comply therewith, or in the event of any person or persons, company, or corporation working by said process in said territory contrary to law.

§ 680. Examination of mines; reports

Said commission, or a committee therefrom, or officer of said corps assigned to duty under its orders, shall, whenever deemed necessary, visit said territory and all mines operating under the provisions of sections 661 to 685 of this title. A report of such examination shall be placed on file.

§ 682. Malicious injury to works; injury to navigable waters by hydraulic mining; penalty

Any person or persons who willfully or maliciously injure, damage, or destroy, or attempt to injure, damage, or destroy, any dam or other work erected under the provisions of sections 661 to 685 of this title for restraining, impounding, or settling purposes, or for use in connection therewith, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not to exceed the sum of $5,000 or be imprisoned not to exceed five years, or by both such fine and imprisonment, in the discretion of the court. And any person or persons, company or corporation, their agents or employees, who shall mine by the hydraulic process directly or indirectly injuring the navigable waters of the United States, in violation of the provisions of said sections shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court.

§ 683. Tax on operation of hydraulic mines; "débris fund"; advances by mine owners; storage for water and use of outlet facilities

Upon the construction by the said commission of dams or other works for the detention of débris from hydraulic mines and the issuing of the order provided for by sections 661 to 685 of this title to any individual, company, or corporation to work any mine or mines by hydraulic process, the individual, company, or corporation operating thereunder working any mine or mines by hydraulic process, the débris from which flows into or is in whole or in part restrained by such dams or other works erected by said commission, shall pay for each cubic yard mined from the natural bank a tax equal to the total capital cost of the dam, reservoir, and rights of way divided by the total capacity of the reservoir for the restraint of débris, as determined in each case by the California Débris Commission, which tax shall be paid annually on a date fixed by said commission and in accordance with regulations to be adopted by the Secretary of the Treasury, and the Treasurer of the United States is authorized to receive the same. All sums of money paid into the Treasury under this section shall be set apart and credited to a fund to be known as the débris fund, and shall be expended by said commission under the supervision of the Chief of Engineers and direction of the Secretary of the Army, for repayment of any funds advanced by the Federal Government or other agency for the construction of restraining works and settling reservoirs, and for maintenance: *Provided,* That said commission is authorized to receive and pay into the Treasury from the owner or owners of mines worked by the hydraulic process, to whom permission may have been granted so to work under the provisions thereof, such money advances as may be offered to aid in the construction of such impounding dams, or other restraining works, or settling reservoirs, or sites therefor, as may be deemed necessary by said commission to protect the navigable channels of said river systems, on condition that all moneys so advanced shall be refunded as the said tax is paid into the said débris fund: *And provided further,* That in no event shall the Government of the United States be held liable to refund same except as directed by this section. The Secretary of the Army is authorized to enter into contracts to supply storage for water and use of outlet facilities

from debris storage reservoirs, for domestic and irrigation purposes and power development upon such conditions of delivery, use, and payment as he may approve: *Provided,* That the moneys received from such contracts shall be deposited to the credit of the reservoir project from which the water is supplied, and the total capital cost of said reservoir, which is to be repaid by tax on mining operations as provided in this section, shall be reduced in the amount so received.

§ 684. Cooperation by commission with State authorities

For the purpose of securing harmony of action and economy in expenditures in the work to be done by the United States and the State of California, respectively, the former in its plans for the improvement and protection of the navigable streams and to prevent the depositing of mining debris or other materials within the same, and the latter in its plans authorized by law for the reclamation, drainage, and protection of its lands, or relating to the working of hydraulic mines, the said commission is empowered to consult thereon with a commission of engineers of said State, if authorized by said State for said purpose, the result of such conference to be reported to the Chief of Engineers of the United States Army, and if by him approved shall be followed by said commission.

§ 685. Construction by commission of restraining works, etc.; use of debris fund

Said commission, in order that such material as is now or may hereafter be lodged in the tributaries of the Sacramento and San Joaquin River systems resulting from mining operations, natural erosion, or other causes, shall be prevented from injuring the said navigable rivers or such of the tributaries of either as may be navigable and the land adjacent thereto, is directed and empowered, when appropriations are made therefor by law, or sufficient money is deposited for that purpose in said debris fund, to build at such points above the head of navigation in said rivers and on the main tributaries thereof, or branches of such tributaries, or any place adjacent to the same, which in the judgment of said commission, will effect said object (the same to be of such material as will insure safety and permanency), such restraining

or impounding dams and settling reservoirs, with such canals, locks, or other works adapted and required to complete same. The recommendations contained in Executive Document Numbered 267, Fifty-first Congress, second session, and Executive Document Numbered 98, Forty-seventh Congress, first session, as far as they refer to impounding dams, or other restraining works, are adopted, and the same are directed to be made the basis of operations.

§ 686. Construction of restraining works in conjunction with State

The Secretary of the Army, in expending appropriations in the preparation for and construction of works for the restraining or impounding of mining débris in the State of California, is authorized to enter into an agreement that the contractor shall look solely to the State of California for one-half of such expense, to be paid out of said State's appropriation, and the United States shall in nowise be liable for said one-half.

The Secretary of the Army, in carrying out the provisions of any Act of Congress, providing for the restraining or impounding of mining débris in California, may, in his discretion, when in his judgment the aggregate of appropriations already made by said State and Congress and available therefor are sufficient to complete the same, undertake the works necessary thereto by hired labor and by purchase of supplies and materials therefor, and may accept payments on account thereof as the work progresses under and according to the provisions of the acts of the legislature of said State for such purposes.

§ 687. Use of State dredge and appliances in river and harbor improvements

The Secretary of the Army is authorized to accept from the State of California the use of any dredger, or appliances owned or controlled by said State, conformably to any offer thereof by the said State; and the Secretary of the Army is authorized to use any such dredger or appliances in any river or harbor improvement that may be prosecuted therein by the United States, either on the part of the United States alone or conjointly with said State: *Provided,* That nothing shall be paid to the State of California for

the use of said dredger, and that nothing herein contained shall create any liability against the United States.

CALIFORNIA WATER CODE

ARTICLE 6

Yuba River Debris Control
[Added by Stats 1957 ch 1958 § 1.]

§ 340. Authorized uses of funds appropriated

Any funds appropriated for Yuba River debris control shall be used for construction, renewal, and repair of works for restraining, impounding and control of debris resulting from mining operations, natural erosion and other causes.

§ 341. Necessity that funds withdrawn from appropriation be matched by expenditure by Federal Government

Funds withdrawn from such appropriation must be matched by an expenditure of like amount by the Federal Government for the same work.

§ 342. Work paid for: Execution and direction: Manner

All work paid for from such appropriation shall be executed by or under the direction of the California Debris Commission, according to plans approved by the Department of Water Resources.

Cal. Stats. 1893, ch. 228

CHAPTER CCXXVIII.

An Act to provide for the appointment, duties, and compensation of a Debris Commissioner, and to make an appropriation to be expended under his directions in the discharge of his duties as such Commissioner.

[Approved March 24, 1893.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The Governor of the State of California shall, on or before the first day of January, eighteen hundred and ninety-four, appoint a competent civil engineer for a period of four years only, to be known as and called the Debris Commissioner.

SEC. 2. Said Commissioner shall, during the time he shall be actually employed in the discharge of his official duties, receive a compensation of three hundred dollars per month and his necessary traveling expenses, to be allowed by the State Board of Examiners.

SEC. 3. Whenever any Board of Engineers of the United States Government shall have been appointed with power to adopt plans and specifications for the construction of works for the impounding of mining debris, it shall be the duty of said Debris Commissioner to consult and advise with such Board of Engineers of the United States Government, and to examine and pass upon the merits of such works, and said Debris Commissioner shall determine whether or not such works are calculated to and sufficient to protect the navigable waters of the State, and to keep a record of such determinations.

SEC. 4. There is hereby appropriated out of the General Fund of the treasury of this State not otherwise appropriated, the sum of two hundred and fifty thousand dollars, no warrant against said sum to be drawn or paid until the United States Government shall have appropriated at least an equal amount, to be used in the construction of works for the restraining or impounding of mining debris in California. Said moneys to be paid only upon orders drawn by the Controller, upon the written request of the said Debris Commissioner, and to be drawn only for the payment of not more than one half of the cost of the construction of any such works for restraining and impounding mining debris as shall have been approved by him and duly adopted and recommended by engineers of the United States Government appointed for that purpose.

SEC. 5. The term of office of said Debris Commissioner shall be four years from the date of his appointment. He shall take the same oath of office as is provided by law for other State officers, and before entering upon the discharge of his duties, shall give

bond, with sufficient sureties, to be approved by the Governor of the State, in the sum of fifty thousand dollars, for the faithful discharge of his duties as such officer.

SEC. 6. The said Debris Commissioner shall have the power to appoint a Secretary, at a monthly salary to be fixed by said Commissioner, not exceeding one hundred and twenty-five dollars per month; said Secretary to hold office at the pleasure of the said Commissioner; *provided, however,* that no Secretary shall be appointed until said Debris Commissioner shall enter upon the actual discharge of his duties.

SEC. 7. All expenditures authorized by the provisions of this Act shall be subject to the approval of the State Board of Examiners; and the State Controller is hereby authorized to draw his warrant for all expenditures not in excess of the appropriation herein provided for, so approved by the State Board of Examiners, and the State Treasurer is hereby directed to pay the same.

Cal. Stats. 1897, ch. 113

CHAPTER CXIII.

An Act to amend an Act entitled "An Act to provide for the appointment, duties, and compensation of a Debris Commissioner, and to make an appropriation to be expended under his directions in the discharge of his duties as such commissioner," approved March 24, 1893.

[Approved March 17, 1898.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section one of the Act entitled "An Act to provide for the appointment, duties, and compensation of a Debris Commissioner, and to make an appropriation to be expended under his directions in the discharge of his duties as such commissioner," approved March twenty-fourth, one thousand eight hundred and ninety-three, is hereby amended so as to read as follows:

Section 1. The Governor of the State of California shall, on or before the first day of January, one thousand eight hundred and ninety-eight, appoint a competent civil engineer for a period of four years only, to be known as and called the Debris Commissioner; *provided, however*, that the Debris Commissioner heretofore appointed under the Act entitled "An Act to provide for the appointment, duties, and compensation of a Debris Commissioner, and to make an appropriation to be expended under his directions in the discharge of his duties as such commissioner," approved March twenty-fourth, eighteen hundred and ninety-three, shall continue to perform the duties, and receive the compensation of that office, subject to the provisions of this Act, until the expiration of the term for which he was appointed and until the appointment and qualification of the Debris Commissioner provided for by this Act.

SEC. 2. Section two of said Act is hereby amended so as to read as follows:

Section 2. Said commissioner shall receive a compensation of ten dollars per day while actually engaged in the discharge of his duties, and his necessary traveling expenses, to be allowed by the State Board of Examiners.

SEC. 3. Section three of said Act is hereby amended so as to read as follows:

Section 3. It shall be the duty of the said Debris Commissioner to consult and advise with the members of the corps of engineers of the United States Army comprising the California Debris Commission (created by Act of Congress approved March first, eighteen hundred and ninety-three), in relation to the construction of works for the restraining and impounding of debris resulting from mining operations, natural erosion, of other causes; and it shall be his duty to examine such works, and to report the result of such examination to the State Board of Examiners. Said Debris Commissioner is futher authorized and directed to consult and advise with said "California Debris Commission" in relation to any and all plans and specifications that may have been or may hereafter be prepared or adopted by said "California Debris Commission," for the construction of such restraining or im-

pounding works, and said Debris Commissioner shall submit a copy of all such plans and specifications to the State Board of Examiners for their examination and consideration, together with his approval or disapproval thereof, or other recommendation with reference thereto. The State Board of Examiners shall thereupon proceed to examine and consider the plans and specifications thus submitted to them, and in that behalf may require the attendance, counsel, and advice of said Debris Commissioner, during their examination and consideration thereof. The State Board of Examiners shall keep a record of their deliberations and shall either approve or disapprove said plans and specifications, which approval or disapproval may be by a majority vote of said board; *provided,* that no plans and specifications involving an expenditure on the part of the State of California of a sum greater than the appropriation herein made shall be approved. If said plans and specifications be approved by the State Board of Examiners, the said Debris Commissioner shall thereupon report such action to said "California Debris Commission." Whenever said "California Debris Commission" or the government of the United States shall have entered into any contract for the construction of works for the purposes described in this Act, in pursuance of plans and specifications that have been theretofore approved by the State Board of Examiners as in this Act provided, it shall then be the duty of the Debris Commissioner to carefully inspect such works during the process of their construction and to keep a record of the result of such inspection and to report the same monthly to the State Board of Examiners. Said Debris Commissioner shall also from time to time, during the process of the construction of such works, when requested so to do by the said "California Debris Commission," draw his warrants upon the State Controller in favor of such person or persons as may be designated by said "California Debris Commission" for such amounts as shall equal one half of the cost of the construction of said works; and said Debris Commissioner shall, in like manner, and when requested so to do by said "California Debris Commission," draw his warrant upon the State Controller for an amount equal to one half the purchase price of any site or sites necessary for the construction of said works; *provided,* that the purchase of such site or sites shall have been first approved by the State Board of Examiners;

and provided further, that no warrant shall be drawn in excess of the amount appropriated by this Act.

SEC. 4. Section four of said Act is hereby amended so as to read as follows:

Section 4. There is hereby appropriated out of the general fund of the treasury of this State not otherwise appropriated, the sum of two hundred and fifty thousand dollars, to be used in the construction of works for the restraining and impounding of debris resulting from mining operations, natural erosion, or other causes, and for the purchase of sites therefor. The appropriation made by this section is intended as a re-appropriation of the sum of two hundred and fifty thousand dollars appropriated by the Act entitled "An Act to provide for the appointment, duties, and compensation of a Debris Commissioner, and to make an appropriation to be expended under his directions in the discharge of his duties as such commissioner," approved March twenty-fourth, eighteen hundred and ninety-three, and it is expressly intended and provided by this Act that the State of California shall, in no event, incur any liability hereunder beyond the amount of the appropriation herein made; and no contractor, claimant, or person shall acquire any right or obligation against the State of California beyond said sum so appropriated and set apart for the purposes hereinabove set forth, and it is expressly declared that any claim or demand against the State of California in excess of said appropriation shall be invalid and void. Said moneys shall be paid only upon orders drawn by the State Controller upon the written request of said Debris Commissioner, as in this Act provided.

SEC. 5. Section seven of said Act is hereby amended so as to read as follows:

Section 7. All expenditures authorized by the provisions of this Act shall be subject to the approval of the State Board of Examiners; and the State Controller is hereby authorized to draw his warrant for all expenditures not in excess of the appropriation herein provided for so approved by the State Board of Examiners, and the State Treasurer is hereby directed to pay the same.

SEC. 6. This Act shall take effect immediately.

SEC. 7. This Act shall take effect immediately.

Appendix I

In the United States District Court
for the District of North Dakota
Southwestern Division
Civil No. A78-1092

The State of North Dakota ex rel.
Board of University and School Lands,

Plaintiff,

vs

John R. Block, Secretary of Agriculture; James G. Watt, Secretary of the Interior; Robert F. Burford, Director of the United States Bureau of Land Management; and R. Max Peterson, Chief of the United States Forest Service,

Defendants.

[Filed Sept. 26, 1984]

MEMORANDUM AND ORDER

This case involves a dispute over ownership of segments of the bed of the Little Missouri River. Both the State of North Dakota and the United States have been leasing out mineral rights to the river bed. In certain instances, both have leased out the same portion of the bed. The State seeks to quiet its title to the river bed pursuant to the Quiet Title Act of 1972, 28 U.S.C. § 2409a (1976). It claims that the bed is state sovereign land under the equal footing doctrine and the Submerged Lands Act, 43 U.S.C. § 1311 (1976). On the other hand, the United States claims certain portions of the river bed as an incident to its ownership of lands abutting the river. It claims other portions as land which remained in the federal public domain because the State made in lieu selections for deficiencies in school grant lands caused by the river.

The Court previously determined that the State's suit was not barred by the statute of limitations contained in 28 U.S.C. § 2409a(f). It specifically held that Section 2409a(f) did not apply when state sovereign lands are involved. *See* 506 F. Supp. 619, 624-26 (1981). The Eighth Circuit affirmed. *See* 671 F.2d

271, 273-76 (1982). However, the Supreme Court reversed, holding that Section 2409a(f) applies to states as well as private citizens. *See* 103 S.Ct. 1811, 1819-22 (1983). It remanded the case for determination of the date on which the State's cause of action accrued. *Id.* at 1823.

On June 11, 1984, this Court held a hearing to take further evidence on the statute of limitations issue. The State objected to re-opening the evidence, and the Court overruled the objection.*

Section 2409a(f) provides that:

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

The Complaint on this case was filed on October 31, 1978. Under the Federal Rules of Civil Procedure, the action was commenced as of that date. *See* Fed. R. Civ. P. 3 (1983). Thus, the specific issue before the Court is whether the State's cause of action accrued before October 31, 1966.

The State contends that its cause of action accured only when it received actual notice of the United States' claims. It argues that this interpretation of Section 2409a(f) is consistent with the strong public policy to prevent inadvertent alienation of public trust lands. The argument assumes that barring this suit is tantamount to finding title in the United States. However, the Supreme Court clearly stated that it is not:

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* The general rule is that the decision whether to re-open the evidence on remand rests in the trial judge's discretion if the appellate court does not give specific instructions regarding the evidence. *See, e.g., Stevens v. F/V Bonnie Doon,* 731 F.2d 729, 731 (9th Cir. 1984); *Sherwin v. Welch,* 319 F.2d 729, 731 (D.C. Cir. 1963).

This Court determined that additional evidence as to the State's knowledge of the United States' claims to specific tracts of the river bed was required to carry out the Supreme Court's ruling. Thus, it re-opened the evidence.

> A dismissal pursuant to § 2409a(f) does not quite title to the property in the United States. The title dispute remains unresolved. Nothing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit, in which the matter would finally be put to rest on the merits.

103 S. Ct. at 1822.

> Whether, in the absence of a suit by it, the United States would ever acquire good title to the disputed area would, under the present status of the law, be strictly a matter of State law. * * * Here, North Dakota asserts that the disputed land is public trust land that cannot ever be taken by adverse possession under North Dakota law.

Id. at 1822 n. 28 (citations omitted).

The argument also assumes that the State should not be bound by the inadvertent failure of state officials to timely bring suit. However, the Supreme Court considered and rejected this factor in determining that Congress intended Section 2409a(f) to apply to states in order to protect the national public interest. *Id.* at 1821. It is also clear that Section 2409a(f) applies even if a claimant could not have legally brought his suit until 1972, when 28 U.S.C. § 2409a was passed. *Id.* at 1818; *see also Stubbs v. United States*, 620 F.2d 775, 780-81 (10th Cir. 1980); *Grosz v. Andrus*, 556 F.2d 972, 975 (9th Cir. 1977).

This Court concludes that the clear language of the statute governs. *See also* 103 S.Ct. at 1818 n. 20 (Senate version of Section 2409a(f) required actual knowledge of the claim, but the version finally passed did not include this requirement). Thus, North Dakota's suit is barred if it knew or should have known of the United States' claim to portions of the river bed prior to October 31, 1966.

Construction of Section 2409a(f) is governed by federal law, although state law can be an aid in determining the application of statutory language to specific facts. *See Amoco Production Co. v. United States*, 619 F.2d 1383, 1387 (10th Cir. 1980). The term "should have known" as used in the statute means a reasonable

awareness that the United States claims some interest adverse to the claimant's. *See Knapp v. United States*, 636 F.2d 279, 283 (10th Cir. 1980). The claimant does not have to have full knowledge of the contours of the federal government's claim. *Id.* If he is on notice of the claim, he has a duty to make reasonable inquiry into the extent of the claim. *See Park County v. United States*, 626 F.2d 718, 721 n. 6 (9th Cir. 1980), *cert. denied* 449 U.S. 1112.

North Dakota law recognizes the concept of constructive notice and defines it as follows:

> Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself.

N.D. Cent. Code § 1-01-25 (1975). This definition of constructive notice is similar to the meaning of "should have known" as set out in the federal cases.

The evidence can be summarized as follows. In March 1955, the Bureau of Land Management (BLM) wrote to the State Attorney General, inquiring "whether or not the Little Missouri River was navigable or non-navigable at the time of admission of the State of North Dakota to the Union." Ex. Y. An assistant attorney general consulted with two state agencies and responded that the river "is not now and has not been considered navigable." Ex. Y.

At about the same time, the Bank of North Dakota started issuing mineral leases for the river bed. Ex. W. The Bank was not one of the agencies consulted by the assistant attorney general to respond to the BLM's inquiry. It had specific authority from 1957 to 1977 to lease beds of navigable waters.[1] In 1953, the Legislature had approved certain mineral leases entered into by the Bank

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[1] 1957 N.D. Sess. Laws ch. 246, § 6 (codified at N.D. Rev. Code § 38-1106 (1943), recodified as N.D. Cent. Code § 38-11-06 (1960)), *repealed by* 1977 N.D. Sess. Laws c. 322, § 9.

prior to March 13, 1951.[2] It is not clear whether this approval extended to leases for the beds of navigable waters.

In approximately June 1955, the BLM began leasing the minerals in certain portions of the river bed. Ex. L at iii; Ex. I.

The earliest recorded federal lease was filed with the Register of Deeds for Slope County, North Dakota, on June 9, 1958. Ex. V. It involved river bed located in Section 6, Township 136 North, Range 103 West. Ex. V.

On June 7, 1962, the Bowman County Pioneer printed a public notice that the BLM was accepting bids for oil and gas leases on certain lands in North Dakota which included portions of the river bed. Ex. U. Five specific segments of the river bed were listed. Ex. U, Parcels 23, 24, 36, 37, 38.

From 1963 through 1965, the BLM recorded various documents relating to mineral leases on nine separate tracts of river bed. Ex. V.

On May 1, 1964, the manager for the Bank of North Dakota signed a communitization agreement which recognized that both the United States and the State claimed ownership of the river bed located in Section 15, Township 29 North, Range 106 West. Ex. T, Communitization Agreement, Ex. "A," Tract No. 2.

On January 27, 1966, an attorney for Shell Oil Company, which held certain mineral leases from the Bank of North Dakota, wrote to the Bank and the State Board of University and School Lands, informing them that the United States was claiming to own sections of the river bed included in the company's leases. Ex. L at 60; Ex. R. While there is no evidence that the Bank and the Board actually received the letter, the State does not dispute receipt.

In 1963 and early 1966, the State Industrial Commission issued spacing orders for lands including the river bed. Exs. R, S, T. Some of the exhibits introduced in the Commission proceedings show federal ownership of riparian lands and federal claims to the

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[2] 1953 N.D. Sess. Laws ch. 229, § 1 (codified at N.D. Cent. Code § 38-09-21 (1972)).

river bed. There is no evidence establishing who presided over the proceedings or who prepared the spacing orders. The names, but not the signatures, of the Governor, the Attorney General and the Commissioner of Agriculture and Labor appear at the end of the orders.

As of November 3, 1980, one federal lease for the river bed was producing. Ex. L at 64. No information was provided as to when the lease began producing. The lease was issued on December 8, 1964. Ex. L at 64.

The record also contains general information on the availability of BLM public notices of lease bidding and BLM records of land ownership and leasing activity.

From this record of incidents, it is clear some state employees had some notice that a contest was developing between North Dakota and United States as to who claimed what portions of the river and on what basis.

But this fact raises the question: Is any notice to any official of the state enough to hold the state under the doctrine of constructive notice? N.D. Cent. Code § 1-01-25 defines constructive notice as:

> Every person who has actual knowledge of circumstances sufficient to put a prudent man upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself.

In this case the "person" is, of course, the State of North Dakota, which can only act through its agents. The "circumstances" are the execution, disclosure, occasional filings, and publication of potential bid lettings, of oil and gas lands, and correspondence relating to lands in each case specifically described by government survey.[3]

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[3] The public domain of the Territory of Dakota was surveyed under the United States Survey System prior to and soon after North Dakota was admitted to statehood in 1889. See the Organic Law, Act of March

But it is well settled that if principles of constructive notice are to apply to a governing body, that notice must be given to an agent who has responsibility and some duty with respect to the subject matter of the notice. In its discussion of Notification To or By Agents, Restatement, Second, Agency § 268, p. 585, the commentator writes:

> The principal is not bound by a notification directed towards an agent whose duties or apparent duties have no connection with the subject matter to which the notification relates.

This language is consistent with the case holdings in this area. For examples:

1. *United States v. Currency Totalling $48,318.08*, 609 F.2d 210 (5th Cir. 1980). Notice must be given to government agent who has authority and duties with regard to the subject matter (quoting Restatement, supra).

2. *United States v. McCullough*, 427 F. Supp. 246 (E.D. Pa. 1977). Notice to the National Labor Relations Board is not notice to the office of the United States Attorney.

3. *United States v. Barket*, 530 F.2d 189 (8th Cir. 1976). Notice to the Department of Justice was notice to the local federal prosecutor since they were within the same agency and the same subject matter was involved.

4. This same doctrine applies, for example, to municipalities. See 63 C.J.S. Municipal Corporations § 833.

The Bureau of Land Management's earliest assertion of claims to the bed of the Little Missouri River was apparently based on the assumption of its non-navigability, and was made by the execution of oil and gas leases containing United States government survey descriptions, in 1955.[4] At that time, by statute, the authority to execute mineral leases on the stream beds of navigable streams was laid in the Bank of North Dakota, N.D. Rev. Code § 47-0608 (1943) (1957 Supplement). And this continued

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2, 1861, Ch. 86, 12 Stat. 239. The survey was completed well before the time involved in this action.

[4] Exhibit L at iii.

in the Bank of North Dakota until the enactment of 1977 N.D. Sess. Laws ch. 322 § 3, when authority for the oil and gas leasing of the beds of navigable streams was transferred to the Board of University and School Lands.

However there is nothing in the record to support the claim that the Bank of North Dakota had any information in any manner about the leasing activities of the Bureau of Land Management in 1955.

The earliest recorded federal lease was filed with the Register of Deeds for Slope County, North Dakota on June 9, 1958.[5] It involved the river bed located in Section 6, Township 136 North, Range 103 West. From 1963 through 1965 the Bureau of Land Management recorded various documents relating to mineral leases on nine separate tracts of river bed.

But the recording acts have no notice impact as to the beds of navigable bodies of water held by the state. See the Marketable Record Title Act, N.D. Cent. Code §47-19.1-11, which specifically excludes the State of North Dakota and the United States from effects of the Marketable Record Title Act. And that exclusionary statute is sensible because the Act draws its authority from the Recording Acts. And it is well established that an owner of realty has no obligation to search the records for evidence of transactions subsequent to his acquisition of title to the property. Thus the rule that the recording of instruments affecting title to real property is constructive notice only to purchasers and encumbrances subsequent to such recording. *First National Bank of Dickinson v. Big Bend Land Co.,* 164 N.W. 322 (N.D. 1917), *Hanson v. Zoller,* 187 N.W.2d 47 (N.D.1971). So the State of North Dakota, as sovereign and owner of the bed of the navigable river, suffered no constructive notice by the recordings of the Bureau of Land Management leases.

June 7, 1962, the Bowman County Pioneer printed a public notice soliciting bids for oil and gas leases on five specific segments of the Little Missouri River bed.[6] However, again, to

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[5] Exhibit V.

[6] Exhibit U. Parcels 23, 24, 36, 37, 38

whom is such an ad soliciting bids notice? There is no constructive notice statute applicable to this type of ad. There is no evidence that Bank of North Dakota personnel concerned with leasing activities examined the ad or even knew about it.

In this, as in all of the incidents above discussed, the Bureau of Land Management was acting on the premise that the Little Missouri River was not navigable. It was therefore acting in reliance on 1943 Code 47-01-15 which is identical to N.D. Cent. Code 47-01-15. This statute provides:

> In all cases where the opposite banks of any stream not navigable belong to different persons, the stream and the bed thereof shall become common to both.

This language has been interpreted to mean that each riparian owner owns to the thread of a non-navigable stream. *Amoco Oil Co. v. State Highway Dept.*, 262 N.W.2d 726 (N.D. 1978). Thus the leases and notices cannot be interpreted to represent a claim by the United States to portions of the bed of the stream that were not riparian to the lands specifically described.

On May 1, 1964, the manager of the Bank of North Dakota signed a communitization agreement which recognized that the United States and North Dakota both claimed ownership of the riverbed located in Section 15, Township 29 North, Range 106 West.[7]

On January 27, 1966, counsel for Shell Oil Company wrote to the Bank of North Dakota, informing it that the United States was claiming to own specified tracts in the bed of the Little Missouri River.[8]

These two incidents were sufficient to put the agent, the Bank of North Dakota, on notice, and as a prudent person it was required to inquire further, and act as necessary to protect its principal's interests in those tracts.

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[7] Exhibit T, Communitization Act.
Exhibit A, Tract No. 2

[8] Exhibit L at 60, Exhibit R.

In 1963 and 1966 the State Industrial Commission issued spacing orders for specific tracts in the river bed.[9] While the record is not clear to this point, this Court must assume that the Bank of North Dakota was alert to these spacing orders, since it was charged with administering oil and gas leaseholds, and again the Bank of North Dakota was placed on notice to inquire further since the orders of necessity included specific descriptions of the land.

As of November 1980, a river bottom lease, issued December 8, 1964, went into production. The State of North Dakota concedes knowledge of the production, but does not concede knowledge of the lease in 1964.

Thus this Court finds that the State of North Dakota had knowledge of that lease as of 1980.

There remains the claim that by conceding that the State of North Dakota took certain lands in lieu of the bed of the Little Missouri River, it lost title to that bed.[10] The United States bases its claim on the holding in *United States v. State of Oregon*, 295 U.S. 610 (1935). But that case dealt with the bed of a non-navigable lake.

The better reasoning as to navigable stream beds is simply that the state's entitlement to the bed of a navigable stream is an incident of its sovereignty, and thus "in lieu of" selections are necessary to insure that the state receives its additional full grant of lands allotted under the Enabling Act.

To summarize: This Court finds the following facts:

1. As to those tracts claimed by the United States, about which the State of North Dakota acting through its agent, the Bank of North Dakota, had actual or constructive notice, before October 31, 1966, the twelve year statute of limitations embodied in 28 U.S.C. § 2409(a) has run. Therefore, the claim must be dismissed and the dispute remains unresolved.

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[9] Exhibits R, S, T.

[10] The "in lieu of" language is found in Section 10 of the Enabling Act of February 22, 1889, Ch. 180, 25 Statutes at Large 676.

2. Prior to October 31, 1966, the State of North Dakota did not have actual or constructive notice that the United States claimed all of the river bed of the Little Missouri River adjacent to lands which were owned by it, or by the State of North Dakota as allotted lands.

3. Actual and constructive notice of the claims of the United States developed only as to specific tracts of river bed adjacent to riparian lands specifically described by government survey.

4. The fact of leasing activity by the Bureau of Land Management in 1955 did not give rise to actual or constructive notice to the Bank of North Dakota, or the State of North Dakota.

5. The recording of Bureau of Land Management leases in 1968, and 1963 through 1965, did not give rise to actual or constructive notice to the Bank of North Dakota, or the State of North Dakota.

6. The 1962 publication of notice of lease letting in the Bowman County Pioneer, by the Bureau of Land Management, did not give rise to actual or constructive notice to the Bank of North Dakota or the State of North Dakota.

7. The signing of a communitization agreement as to specified tracts lying in the bed of the Little Missouri River, on May 1, 1964, did give actual notice of the claim of the United States to the specific tracts identified in that agreement. As to those tracts the action to quiet title must be dismissed.

8. The letter from counsel for Shell Oil Company to the Bank of North Dakota, dated January 27, 1966, and admittedly received in the regular course of the mail, and therefore before October 31, 1966, was sufficient to "put a prudent man upon inquiry," and therefore was constructive notice to the State of North Dakota as to those tracts specifically identified in that letter. As to those tracts the action to quiet title must be dismissed.

9. The 1963 and 1969 spacing orders, dealing as they did with lands claimed by the State of North Dakota, and administered by the Bank of North Dakota, was sufficient to "put a prudent" agent "upon inquiry," and therefore was constructive notice as to those

tracts specifically identified in the spacing orders. As to those tracts the action to quiet title must be dismissed.

10. The statute of limitations has not run against the other tracts located in the bed of the Little Missouri River.

From those facts, this Court concludes:

The statute of limitations contained in 28 U.S.C. § 2409(a) does not compel dismissal of this action, except as to those specific tracts as to which the State of North Dakota received actual or constructive notice of the claims of the United States prior to October 31, 1966, and which are identified above.

Counsel have agreed that resolution of this problem is determinative of the remaining issues in this lawsuit. Therefore,

IT IS ORDERED that counsel for the plaintiff shall prepare a proposed form of judgment and present it to the Court, with a copy to counsel for the defendants, within ten days from the filing of this order. Defendants shall have twenty days from the filing of this order in which to object to the proposed form of judgment.

Bismarck, North Dakota this 26 day of September, 1984.

BRUCE M. VAN SICKLE.
Bruce M. Van Sickle, Judge
United States District Court